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APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

U.S. COURT OF APPEALS
FILED
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CHARLES R. FULBRUGE III
CLERK

No. 99-20868

JOHNNY PAUL PENRY

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Penry filed a motion for a certificate of appealability (COA) in this § 2254 capital habeas proceeding, alleging various constitutional violations. For the reasons that follow, we deny his motion.

I.

Penry was convicted of capital murder and sentenced to death in Texas state court for the rape and murder of Pamela Carpenter. Penry raped Carpenter and stabbed her with a pair of scissors. He had met her several weeks earlier while helping to install appliances in her home. Penry matched the description Carpenter gave of her attacker before she died. After being given his Miranda warnings, Penry gave an oral confession and later a signed confession to the rape and murder. At trial, Penry offered mitigating evidence that he was mentally retarded and abused as a child. He was convicted and sentenced to death. The United States Supreme Court granted federal habeas relief and vacated his sentence, holding that Penry's rights were violated by jury instructions the trial court gave at the punishment phase of his trial.[1] The court found that none of the three special statutory questions provided to the jury, under Texas law, allowed the jury to give effect to Penry's mitigating evidence. "The jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence." Penry I, 492 U.S. at 320; 109 S.Ct. at 2947.

In the second trial, the trial court followed the Texas statutory scheme and gave the jury the same three special questions it had given the jury in the first trial. However, the judge also provided supplemental instructions directing the jury to consider any other relevant mitigating evidence and explained how to give effect to that evidence. Penry was again convicted of capital murder and sentenced to death. The sentence was again affirmed on

[1] Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989) ("Penry I").

direct appeal[2] and state habeas relief was denied. The district court also denied Penry's application for a COA. Penry now seeks a COA from this court. We granted Penry's motion for a stay of execution, in order to consider his motion for a COA.

II.

A COA may only issue if the petitioner makes a "substantial showing of the denial of a constitutional right."[3] This burden can be met if the issues presented "are debatable among jurists of reason; …a court could resolve the issues in a different manner; or …the questions are adequate to deserve encouragement to proceed further."[4]

A death sentence alone does not justify the automatic issuance of a COA, although it is a proper consideration.[5] Any doubts as to whether the COA should issue are to be resolved in the petitioner's favor.[6]

Penry's petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA). Thus, for questions of law or mixed questions of law and fact adjudicated on the merits in state court, we may grant federal habeas relief under

[2] Penry v. State, 903 S.W.2d 715 (Tex. Crim. App. 1995).

[3] 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 120 S.Ct. 1595, 1603 (2000); United States v. Kimler, 150 F.3d 429, 431 (5th Cir. 1998).

[4] Miller v. Johnson, 200 F.3d 274, 280 (5th Cir. 2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383, 3394 n.4 (1983)); Hicks v. Johnson, 186 F.3d 634, 636 (5th Cir. 1999), cert denied 120 S.Ct. 976 (2000); see also Slack, 120 S.Ct. at 1603-4 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 and n. 4, 103 S.Ct. 3383).

[5] Lamb v. Johnson, 179 F.3d 352, 356 (5th Cir. 1999), cert denied 120 S.Ct. 522 (1999).

[6] Id.

28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]."[7] A state court decision is "contrary to" Supreme Court precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) the "state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at an opposite result. Williams v. Taylor, 2000 WL 385369, at *23 (U.S. Apr. 18, 2000). A state court unreasonably applies Supreme Court precedent if: (1) it unreasonably applies the correct legal rule to the facts of a particular case or (2) it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at *25. In deciding whether a state court's application was unreasonable, this court considers whether the application was "objectively unreasonable." Id. at *26. We now turn to Penry's specific arguments on appeal.

III.

Penry first argues that the jury instructions given during the punishment phase of his trial did not allow the jury to consider and give effect to mitigating evidence regarding his alleged mental retardation and severe child abuse; thus, the instructions violated

[7] See Miller, 200 F.3d at 280-81.

the Supreme Court's directive in Penry v. Lynaugh,[8] ("Penry I"). Penry explains that jurors could only give effect to his mitigating evidence, as the Supreme Court required in Penry I, and grant him a life sentence if they found that the evidence fit under one of the three special questions required by Texas law.[9] In Penry I, Penry's federal habeas challenge to his first trial and conviction, the Supreme Court found that, under the trial court's instruction, none of the three special statutory questions allowed the jury to give effect to Penry's mitigating evidence. At Penry's retrial, however, the trial court supplemented the instruction it gave in Penry I. The court instructed the jury to consider any mitigating circumstances supported by the evidence. The instruction stated, in part:

> [W]hen you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence…. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find…any mitigating circumstances…you must decide how much weight they deserve, if any, and…give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

Penry correctly contends that the instruction still required the jury to give a negative answer to one of the three special issues in order for Penry to receive a life sentence. Penry argues that because childhood abuse and mental retardation do not necessarily fit within the scope of any of the special issues, this instruction did not allow the jury to give effect to these mitigating circumstances. However, on direct appeal, the Texas Court of Criminal Appeals found that the instruction satisfied the requirements of Penry I, and allowed the jury to give effect to those mitigating circumstances.[10]

We agree with the district court that the Texas Court of Criminal Appeals' holding that the challenged instruction was constitutional was not an unreasonable application of clearly established law, namely Penry I. The instruction directed the jury to consider and give effect to any mitigating circumstances supported by the evidence by answering "no" to one of the special issues if they felt a life sentence was appropriate. This instruction satisfied the deficiency in the trial court's

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[8] 492 U.S. 302, 109 S.Ct. 2934 (1989).

[9] The three questions were: 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result? 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? 3. Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased? Since Penry, the statute has been revised to add a fourth question concerning mitigation.

[10] Penry v. State, 903 S.W.2d 715, 765 (Tex. Crim. App. 1995).

instruction identified in Penry I: "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence."[11]

We are not writing on a clean slate on this issue. This court approved identical jury instructions on this point in Miller[12] and Emery v. Johnson.[13] In Miller, we concluded that the defendant failed to show that the same instructions given by the trial court in this case violated Penry I. We rejected the argument that the jury was prevented from considering the mitigating evidence.[14] "Miller's jury, unlike Penry's, was instructed that it should consider mitigating evidence when deliberating on the special issues....[It] was instructed that if it determined when giving effect to the mitigating evidence, if any, that a life sentence rather than a death sentence was an appropriate response to Miller's personal culpability, a negative finding should be given to the special issue under consideration."[15]

In the alternative, Penry argues that the jury charge was a "nullification instruction" and was therefore unconstitutional insofar as it instructed jurors to violate their oaths by rendering an untruthful answer to one of the special issues if they wished to

[11] Penry, 492 U.S. at 320, 109 S.Ct. at 2947.
[12] 200 F.3d 274.
[13] 139 F.3d 191 (5th Cir. 1997), cert denied 119 S.Ct. 418 (1998).
[14] 200 F.3d at 290.
[15] Miller, 200 F.3d at 290.

give effect to the mitigating evidence presented in this case. We disagree. The jury was not told to disregard the law; rather, it was instructed on how to obey the law, as explained by the Supreme Court in Penry I.

IV.

Next, Penry argues that the admission of certain psychiatric testimony and evidence offered by the state at trial violated his Fifth and Sixth Amendment rights.

A.

Penry's Fifth Amendment challenge involves three categories of psychiatric testimony and evidence presented by the state: 1. the testimony of Dr. Fason admitted during the guilt/innocence phase of trial; 2. the testimony of Dr. Quijano admitted during the punishment phase of trial; and 3. the report of Dr. Peebles describing a court-ordered examination of Penry, which was admitted at the punishment phase of trial.

1.

Penry's primary challenge is to the testimony of Dr. Fason. Penry contends that Fason's testimony was based on his court-ordered competency examination of Penry, and that the state's use of the testimony to argue future dangerousness during the punishment phase violated Penry's rights under Estelle v. Smith.[16]

[16] 451 U.S. 454, 101 S.Ct. 1866 (1981). Estelle held that the defendant's Fifth Amendment right against compelled self-incrimination was violated because he was not told that any statements made during his competency exam could be used

More particularly, Penry argues that his Fifth Amendment privilege against compelled self-incrimination was violated because he was not advised before Dr. Fason's examination of his right to remain silent and that his statements could be used against him at the sentencing proceeding.

On direct appeal, the Texas Court of Criminal Appeals found that Dr. Fason's testimony fell within the Buchanan v. Kentucky[17] exception to Estelle. Under Buchanan, if a defendant presents psychiatric evidence, then the prosecution may present rebuttal psychiatric evidence without violating the Fifth Amendment.

Penry contends that, as applied to this case, proper rebuttal evidence under Buchanan is limited to evidence tending to prove that Penry is not mentally retarded, and that the state's evidence went beyond that scope. After a careful review of the record, we find that Fason's testimony did fall within the Buchanan exception.

At the guilt/innocence phase of trial, Penry offered various psychological records, including reports of his performance on a number of psychological and IQ tests. The records also included observations of his emotional status and social behavior. As demonstrated by the closing argument of Penry's attorney, one reason these records were introduced was to lay a predicate for an argument that Penry's confessions were not truly voluntary because

against him at the punishment phase on the issue of future dangerousness.

[17]483 U.S. 402, 107 S.Ct. 2906 (1987).

Penry is mentally retarded and thus submissive to authority figures. The evidence was also offered to support Penry's argument that his mental retardation made him less likely to act with the intent required for capital murder.

Dr. Fason's testimony was introduced to rebut these arguments. Fason testified that Penry had an antisocial personality disorder. He explained how that condition could affect Penry's IQ scores, and that it was possible that Penry was not mentally retarded. Also, he testified that someone with an antisocial personality disorder would usually not be easily led by others and would likely disrespect and rebel against authority. Fason did not discuss any statements made by Penry during Fason's examination, except whether Penry was able to identify his attorney at the interview. We disagree with Penry's characterization of Fason's testimony as a "sham rebuttal" by the state in order to introduce to the jury the idea that Penry was a "psychopath." Penry's defense centered around his diminished capacity -- his alleged mental retardation at the time of the offense -- and the idea that his mental status rendered his confessions involuntary. Therefore, we conclude that the Court of Criminal Appeals' determination that Fason's testimony was proper rebuttal under Buchanan is neither contrary to nor an unreasonable application of clearly established federal law.[18]

[18]See Vardas v. Estelle, 715 F.2d 206, 209-10 (5th Cir. 1983) (finding no violation of defendant's Fifth Amendment privilege because state psychiatrists' testimony was proper as rebuttal to defendant's insanity defense; psychiatrists

In addition to his challenge to Dr. Fason's guilt phase testimony, Penry also challenges the court's admission, at the punishment phase, of the testimony of Dr. Quijano and the report of Dr. Peebles as violating Estelle.

At the punishment phase, Penry called various relatives and neighbors who testified that they believed Penry was mentally retarded and abused as a child. He also called Dr. Randall Price, who had reviewed certain portions of Penry's medical records, and had also administered various psychological tests to Penry. Dr. Price concluded that Penry had a brain impairment and was mentally retarded, and that the mental retardation could have influenced his involvement in criminal activity. Although he admitted that Penry had an antisocial history, he stated that Penry "looks more like people with brain damage...than those with antisocial personality."

In rebuttal, the state called Doctors Quijano and Samenow and introduced into evidence a number of Penry's mental health records. Dr. Quijano conducted a court-ordered competency examination of Penry. He testified that Penry had an antisocial personality disorder which made him more likely to be violent in the future. However, he testified that he based his opinion only on Penry's medical records including evaluations by others, and not on his own examination of Penry. Thus, the Texas Court of Criminal Appeals

testified that defendant was not insane, but instead was a sociopath.).

found no Fifth Amendment violation. This finding was not contrary to nor an unreasonable application of clearly established federal law.[19]

The report of Dr. Peebles was admitted into evidence during the punishment phase, and was based on Dr. Peebles' 1977 examination of Penry prior to his trial on an unrelated rape charge. The report determined that Penry would be dangerous in the future if released. At the time of Dr. Peebles' examination, Penry was not yet in custody on the instant capital charge, and thus could not have been warned about the potential use of his statements at the punishment phase of the capital trial. The Texas Court of Criminal Appeals found no Fifth Amendment violation because Penry's attorney had requested the examination; thus, Dr. Peebles was acting as an agent of the defense, not of the state, in conducting his examination.[20] We cannot say that the court's conclusion was unreasonable or contrary to Supreme Court

[19] See Williams v. Lynaugh, 809 F.2d 1063, 1068 (5th Cir. 1987) (finding no factual basis for Fifth Amendment violation where state psychologist's testimony on future dangerousness was not based on his interview with the defendant.) See also Hughes v. Johnson, 191 F.3d 607, 616-17 (5th Cir. 1999) (finding reasonable a state court's conclusion that psychiatrist's testimony did not violate Estelle, despite his having conducted a prior improper interview, because it did not influence his testimony; also rejecting idea that "taint" of prior improper interview created absolute bar to any expression of opinion by that psychiatrist); cf. Flores v. Johnson, 2000 WL 426212, at *1, * 7 - *13 (5th Cir. April 20, 2000) (Emilio M. Garza, J., specially concurring) (following but questioning Supreme Court authority allowing psychiatric testimony on future dangerousness deduced without examining the defendant).

[20] Penry, 903 S.W.2d. at 759-60; see Nelson v. State, 848 S.W.2d 126, 135 (Tex. Crim. App. 1992); Estelle, 451 U.S. at 467-68, 101 S.Ct. at 1875-76 (noting that the defendant there did not initiate the examination and was not faced with a person acting solely in his interest).

precedent.[21]

B.

Penry also argues that his Sixth Amendment right to effective assistance of counsel was violated by the use of testimony on future dangerousness from Doctors Quijano and Fason because Penry and his counsel were told that their examinations of him were solely for the purpose of determining competency. Under Powell v. Texas, "once a capital defendant is formally charged, the Sixth Amendment right to counsel precludes such an examination without first notifying counsel that 'the psychiatric examination [will] encompass the issue of their client's future dangerousness.'"[22] The Texas Court of Criminal Appeals concluded that Penry's attorney was "on notice that if he intended to put on a 'mental status' defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal."[23] At a pretrial hearing, the trial court expressly warned Penry's counsel that the testimony of Doctors Fason and Quijano might be admissible at trial if the

[21]See Buchanan v. Kentucky, 483 U.S. 402, 422-23, 107 S.Ct. 2906, 2917-18 (1987) (finding that "if a defendant requests [the psychiatric] evaluation or presents psychiatric evidence...the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."). (Emphasis added); see also Schneider v. Lynaugh, 835 F.2d 570, 577 (5th Cir. 1988) (finding that, under Buchanan, the fact that defendant requested the competency examination militated against the defendant's assertion of the Fifth Amendment privilege, particularly when defendant had also introduced psychological evidence.).

[22]492 U.S. 680, 681, 109 S.Ct. 3146, 3148 (1989) (quoting Estelle, 451 U.S. at 471, 101 S.Ct. at 1877).

[23]Penry, 903 S.W.2d at 758.

defense put on psychiatric evidence.[24] At trial, Penry argued that he was mentally retarded; thus his confessions were involuntary. He also argued that mental retardation could have been a contributing cause of Penry's violent criminal acts and that his mental retardation mitigated against the imposition of the death penalty. The state was entitled to rebut this evidence by offering psychiatric evidence that some condition other than mental retardation was a more sound explanation for Penry's conduct. Thus, the Court of Criminal Appeals' findings are not contrary to, nor an unreasonable application of, clearly established federal law.

V.

Penry next contends that his execution would violate the Eighth Amendment, based on his alleged mental retardation and severe child abuse. First, Penry makes a general argument that execution of the mentally retarded is a per se violation of the Eighth Amendment. We agree with the district court that this claim is procedurally barred because Penry did not make the argument in state court. However, even if this claim was not procedurally barred, it has been rejected by the Supreme Court.[25]

Penry also argues that the death penalty would be cruel and

[24]Id. at 759, n. 46.

[25]See Andrews v. Collins, 21 F.3d 612, 632 (5th Cir. 1994), cert. denied 513 U.S. 1114, 115 S.Ct. 908 (1995) (citing Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989)).

unusual as applied to him personally, because of his mental retardation and severe childhood abuse. This argument also fails. On Penry's direct appeal, the Texas Court of Criminal Appeals (citing Penry I) concluded that constitutional requirements were met because the jury was able to consider and give effect to Penry's mitigating evidence before determining that the death sentence was appropriate.[26] In Penry's second trial, he presented extensive mitigating evidence and the jury was instructed to consider that evidence and told how to give it effect. More significantly, although Penry was the individual before the Supreme Court in Penry I, the Court did not suggest that his execution would be unconstitutional based on his mental retardation or childhood abuse. The Texas Court of Criminal Appeals' conclusion that Penry's execution would not violate the Eighth Amendment was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

VI.

Penry makes several other arguments in support of his motion. He contends that: 1. the trial court violated his rights under Simmons v. South Carolina[27] by excluding his signed statement waiving any right to parole, while allowing the state to argue future dangerousness; 2. his confessions were taken involuntarily

[26]Penry, 903 S.W.2d at 766-67.
[27]512 U.S. 154, 114 S.Ct. 2187 (1994).

in violation of the Fifth Amendment; and 3. the jury instructions at his competency trial were unconstitutionally vague because they did not define the terms "reasonable," "rational," and "understanding." We find all of these arguments to be unpersuasive, essentially for the reasons given by the district court in its thorough opinion of March 29, 1999.

VII.

For the reasons stated above, we deny Penry's motion for a certificate of appealability. We also vacate the stay of execution previously entered by this court.

Dennis, J., dissenting:

In *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), the Supreme Court held that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* at 319. Accordingly, the jury must be "instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence." *Id.* at 320. The Court agreed with Penry "that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." *Id.* at 322.

Moreover, in *Penry I*, the Court stated that in the absence of a special jury instruction "defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability...a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.'" *Id.* at 323. Likewise, the Court observed, the mitigating evidence concerning Penry's mental retardation, which indicated his inability to learn from his mistakes, was relevant to the second issue only as an aggravating factor because it suggests a "yes" answer to the question of future dangerousness. *Id.* at 323. Consequently, the Court concluded, the second special issue "did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse." *Id.* at 324. With respect to the third special issue, the Court stated, a juror who found that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult would not necessarily

conclude that Penry's conduct was reasonable in response to the provocation, if any, by the deceased. "Thus", the Court reasoned, "a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation." *Id.* at 324-25.

In light of the prosecutor's argument to the jurors that, under their oath to follow the law, they must follow the instructions they were given in answering the special issues, the Court concluded that, "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

In *Penry I*, the State of Texas conceded at oral argument before the Supreme Court that if a juror concluded that Penry acted deliberately and was likely to be dangerous in the future, but also concluded that because of his mental retardation he was not sufficiently culpable to deserve the death penalty, that juror would be unable to give effect to that mitigating evidence under the instructions given in the case. *See id.* at 326. Finally, the Court held that "[i]n this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328.

Justice Scalia, in his concurring and dissenting opinion in *Penry I*, criticized the majority's holding as follows:

> In providing for juries to consider all mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, it seems to me Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence. The Court today demands that it be replaced, however,

> with a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he "lacked the moral culpability to be sentenced to death," *ante*, at 2950, "did not deserve to be sentenced to death," *ante*, at 2951, or "was not sufficiently culpable to deserve the death penalty," *ibid.* The Court seeks to dignify this by calling it a process that calls for a "reasoned moral response," *ante*, at 2949, 2951--but reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional "moral response" that the Court demands be allowed--an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy.

Id. at 359-60 (Scalia, J., concurring in part and dissenting in part).

The sentencing scheme and instructions adopted by Texas in Penry's second trial, the subject of the present case, do not satisfy the constitutional requirements described in *Penry I*. The jury was not clearly and directly instructed that it could consider and give effect to the mitigating evidence of Penry's mental retardation, organic brain damage and abused background as a whole and beyond the scope of the special issues by declining to impose the death penalty. Texas did not replace its sentencing scheme with one which puts "before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he 'lacked the moral culpability to be sentenced to death[.]'" *Id.* at 360 (Scalia, J., concurring in part and dissenting in part). Instead, in the present case, the jury was instructed: "If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." These instructions require the jury to consider and use only mitigating

evidence relevant to the special issues, and permit the jury to decline to impose the death penalty only if that relevant mitigating evidence would cause the jury to change a "yes" answer to a "no." Therefore, the sentencing scheme used in Penry's second trial is subject to the same flaws pointed out by *Penry I*. It does not permit the jury to give effect to the mitigating evidence of retardation and abuse as a whole and beyond the scope of the special issues by declining to impose the death penalty despite its findings of "yes" to the three special issues questions. The jury's consideration of the mitigating evidence of mental retardation, organic brain damage and extensive child abuse is still shackled and confined within the scope of the three special issues. Therefore, the trial court failed to comply with the dictates of the Supreme Court and again deprived the jury of the ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse.

The Supreme Court in *Penry I* held that the jury was not adequately instructed to take into consideration all of Penry's mitigating evidence and that the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to all of his mitigating evidence in answering them. When the Court reversed and remanded for these reasons, the district court and this court became bound by the mandate rule. The mandate rule is not, strictly speaking, merely a matter of law of the case. *See United States v. Wells*, 519 U.S. 482, 488 n.4 (1997). On remand, the district court and the court of appeals owe obedience to the mandate of the Supreme Court and must carry it into effect. *See Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (once case is remanded, circuit court is bound by decree); MOORE'S FEDERAL PRACTICE 3D § 134.23[1][a].

Subsequently, the Supreme Court distinguished its holding from *Penry I* in cases involving other types of mitigating evidence. *See Johnson v. Texas*, 509 U.S. 350, 369 (1993) ("The evidence of petitioner's youth, however, falls outside Penry's ambit. Unlike Penry's mental retardation,

which rendered him unable to learn from his mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue."); *Graham v. Collins*, 506 U.S. 461, 475-76 (1993) ("The jury was not forbidden to accept the suggestion of Graham's lawyers that his brief spasm of criminal activity in May 1981 was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated. Even if Graham's evidence, like Penry's, had significance beyond the scope of the first special issue, it is apparent that Graham's evidence – unlike Penry's – had mitigating relevance to the second special issue concerning his likely future dangerousness. Whereas Penry's evidence compelled an affirmative answer to that inquiry, despite its mitigating significance, Graham's evidence quite readily could have supported a negative answer."). Accordingly, we are still bound by the mandate and the holding of *Penry I* and must carry them into effect now in the present case.

Moreover, there is no circuit precedent which prevents this panel from owing obedience to the mandate and holding of *Penry I*. In our prior decisions, *Penry I* was not applicable because the proffered evidence either was not constitutionally mitigating evidence[1] or was not beyond the scope of the special issues or beyond the effective reach of the jurors,[2] or because the claim was procedurally barred.[3]

In *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), this court explained that *Penry*

[1] *See Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994) (citing *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc)).

[2] *See Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc); *Miller v. Johnson*, 200 F.3d 274, 289-90 (5th Cir. 2000).

[3] *See Emery v. Johnson*, 139 F.3d 191, 199-200 (5th Cir. 1997).

I presented a "wholly different type of mitigating evidence. ~~Not evidence~~ of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but nonetheless evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue." *Id.* at 1029. This court in *Graham* observed that "*Penry* can fairly be read as precluding use of the Texas statutory scheme in any such situation. But, *Penry* can also fairly be read as addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of any of the [special] issues." *Id.* at 1027. Consequently, the use of the Texas statutory scheme was precluded in Penry's situation and this panel has a duty to carry into effect the mandate and holding of *Penry I*. For these reasons, I would grant Penry's application for a COA.

I would also grant a certificate of appealability to consider the alleged violations of Penry's 5th and 6th Amendment rights. I share the concerns articulated by Judge Emilio M. Garza's special concurrence in *Flores v. Johnson*, 210 F.3d 456, 458-70 (5th Cir. 2000) (Judge Emilio M. Garza, specially concurring) and believe that Penry has made a substantial showing that the cumulative effect and reinforcement of the prohibited use of the Texas statutory scheme by the erroneous admission of the psychiatric testimony further violated his constitutional rights.

APPENDIX B

DECISION OF THE UNITED STATES DISTRICT COURT

CLERK, U. S. D.
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3-30-99
MICHAEL N. MILBY, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 30 1999
MICHAEL N. MILBY, Clerk

JOHNNY PAUL PENRY,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. H-97-4094
	§	
GARY L. JOHNSON,	§	
Director, Texas Department of	§	
Criminal Justice, Institutional Division,	§	
	§	
Respondent.	§	

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MEMORANDUM AND ORDER

Petitioner, Johnny Paul Penry, seeks a federal writ of habeas corpus under 28 U.S.C. § 2254 vacating his state capital murder conviction and death sentence. (Docket Entry No. 18). Respondent, Gary L. Johnson, Director, Texas Department of Criminal Justice—Institutional Division, has answered and moved for summary judgment. (Docket Entry No. 20). Penry has replied to respondent's motion for summary judgment; moved to strike respondent's motion for summary judgment; and cross-moved for summary judgment on several of his claims for relief. (Docket Entry Nos. 27 and 28).

Based on a careful review of the petition, the motions, the reply, the state court records, and the applicable law, this court GRANTS respondent's motion for summary judgment; DENIES Penry's motion to strike respondent's motion for summary judgment; and DENIES Penry's cross-motion for summary judgment. Based on these rulings, this court lifts the stay of execution, denies the petition for writ of habeas corpus, addresses the issuance of a certificate of appealability, and dismisses this case.

The reasons for these rulings are set out in detail below.

I. Procedural History

On November 7, 1979, the State of Texas indicted Penry for the capital murder of Pamela Carpenter. (Trans. Vol. 1, p. 1).[1] In 1980, after a transfer of venue on defendant's motion, and following a competency hearing, a jury tried Penry, convicted him of capital murder, and sentenced him to death. The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied sub nom., Penry v. Texas*, 106 S. Ct. 834 (1986). The Court of Criminal Appeals denied Penry's application for state habeas relief on May 5, 1986. The Eastern District of Texas and the Fifth Circuit denied Penry's federal petition for a writ of habeas corpus. *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987).

In 1989, the United States Supreme Court granted Penry's petition for habeas relief, ruling that the jury instructions in the sentencing phase of his trial did not allow the jury to consider and give effect to the mitigating evidence of Penry's mental retardation and history of childhood abuse. *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989)

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[1] The state court records of Penry's 1990 retrial consist of a five-volume transcript of pretrial motions, court orders, and other pleadings, cited as "Trans. Vol. ___, p. ___"; a fifty-two volume Statement of Facts, including hearings on pretrial motions, the suppression hearing, the competency hearing, the change of venue hearing, jury voir dire, the guilt/innocence proceedings, the sentencing proceedings, and the hearing on Penry's motion for new trial, cited as "S.F. Vol. ___, p. ___"; and a four-volume transcript of the state habeas proceedings, cited as "S.H. Vol. ___, p. ___." The parties have also submitted the Statement of Facts from Penry's 1980 suppression hearing and his 1980 trial.

("*Penry* I"). The Supreme Court held that the sentencing instructions deprived the jury of a "vehicle for expressing its 'reasoned moral response'" to the mitigating evidence Penry presented. *Id.* at 2952. Concluding that the sentence imposed did not result from the individualized determination required by "the fundamental respect for humanity underlying the Eighth Amendment," the Supreme Court vacated the conviction and sentence and remanded the case. *Id.* at 2945 (quoting *Woodson v. North Carolina*, 96 S. Ct. 2978, 2991 (1976)).

After a second competency hearing, the State of Texas retried Penry for capital murder ("*Penry* II").[2] The jury found Penry guilty of capital murder on July 9, 1990, and sentenced him to death on July 17, 1990. The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App.), *cert. denied sub nom.*, *Penry v. Texas*, 116 S. Ct. 480 (1995). On October 17, 1996, Penry filed an application for state habeas relief. On July 3, 1997, the state district court held an evidentiary hearing on three of Penry's claims. On September 23, 1997, the state district court denied Penry's habeas

[2] The case was remanded to Trinity County, Texas, the location of Penry's first trial. The trial judge changed venue to Polk County, Texas, where Penry's indictment had issued. The trial court granted Penry's motion for a change from that venue, moving the trial to Walker County, Texas, but denied a subsequent motion to change venue. Penry's second trial took place in Walker County.

application. On December 3, 1997, the Texas Court of Criminal Appeals denied the habeas application, adopting the district court's recommendation.

On December 9, 1997, the state district court scheduled Penry's execution for May 13, 1998. On March 2, 1998, Penry filed a federal petition for writ of habeas corpus in this court. Penry asserts the following claims for relief:

I. The trial court failed to give the jury a vehicle for considering mitigating evidence concerning Penry's childhood abuse and mental retardation.

II. Penry's execution would violate his right to be free from cruel and unusual punishment because Penry is mentally retarded.

III. Penry's execution would violate the Eighth Amendment because there currently exists a national consensus against the execution of the mentally retarded.

IV. The trial court violated *Simmons v. South Carolina* by refusing to admit Penry's evidence regarding the unlikelihood of parole yet permitting the prosecutor to argue Penry's future dangerousness.

V. The trial court violated Penry's rights under *Estelle v. Smith* by admitting evidence derived from involuntary psychiatric examinations.

VI. The trial court violated Penry's constitutional rights by excluding evidence of Penry's mother's mental illness.

VII. The State violated Penry's constitutional rights by failing to administer his anti-psychotic medication during the competency hearing and by failing to correct inaccurate testimony regarding the nature and purpose of the medication.

VIII. Penry's execution after eighteen years on death row would violate his constitutional rights under the Eighth Amendment.

IX. Penry's *Miranda* rights were violated, rendering his confessions illegal and improperly admitted at trial.

X. The trial court violated Penry's rights under the Sixth and Fourteenth Amendments by refusing to change venue from Walker County.

XI. Penry's constitutional rights were violated by the prosecution's misstatement of the law during voir dire.

XII. The trial court's jury charge during the punishment stage violated Penry's constitutional rights.

XIII. Penry's competency hearing was constitutionally inadequate.

XIV. The trial court's admission of irrelevant hearsay evidence violated Penry's Fifth and Sixth Amendment rights.

XV. Texas's clemency procedures violate Penry's substantive and due process rights under the

Fourteenth Amendment and, therefore, violate Penry's rights under the Eighth Amendment.

On April 20, 1998, this court granted Penry's motion for a stay of his execution for the limited purpose of permitting full consideration of Penry's claims. Each of Penry's claims is addressed below.

II. Factual Background: The Record of *Penry* I and *Penry* II

On October 25, 1979, Pamela Carpenter telephoned a friend, Cynthia Peters, and told her friend that she had been raped and stabbed.[3] Peters drove to Carpenter's house in Livingston, Texas and found Carpenter, still alive, lying on a bed in her bedroom. Peters called the police.

Officer E.G. Paige of the Livingston Police Department arrived at Carpenter's house and talked to her. Carpenter did not know the identity of her attacker, but gave a description of a white male with black, curly hair, cut over the ears; slender and short; wearing a "reddish plaid shirt" with a "flowery design" and blue jeans. (S.F. Vol. 42, p. 174). Officer Paige noticed a pair of scissors and a pocketknife on the floor in front of Carpenter's bed.

Carpenter was taken to the hospital, where she again described the attacker in similar terms. Carpenter also stated that she did not know the attacker

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[3] The factual background, largely undisputed, is drawn from the prosecution's case-in-chief during the guilt/innocence phase of *Penry* II.

personally but had "seen him in the area." (S.F. Vol. 43, p. 264). Carpenter died at the hospital a short time later.

Billy Ray Nelson, a Polk County deputy sheriff, had heard a police radio report of the attack and a description of the attacker. Nelson thought the description matched Penry, whom he knew. Nelson drove to Penry's father's house in Livingston, Texas. Penry answered the door, wearing blue jeans without a shirt. Nelson told Penry briefly about the attack on Carpenter and asked Penry to come with him to the police station. Penry put on a shirt and Nelson drove him to the Livingston police station in the police car.

When Penry got out of the car at the station, Nelson and another officer in the car noticed blood soaking through the back of Penry's shirt. The officers asked Penry about the blood. Penry took off his shirt and showed the officers two puncture wounds below his right shoulder. Penry told the officers that he had received the wounds that morning when he had fallen off his bicycle and landed on a stick. Penry's shirt did not have holes in it, but Penry told the officers that the shirt he had been wearing when he was injured was at his father's house.

The officers obtained Penry's consent to search his father's house for the shirt and drove Penry back to the house. Penry entered the house, located the shirt, and gave it and an undershirt to the officers. The shirt and undershirt were later determined

to be torn in the location corresponding to Penry's puncture wounds. Both shirts had a blood stain around the tear.

The officers asked Penry to accompany them to the Carpenter home. Penry agreed. At the Carpenter home, Penry remained in Nelson's patrol car. While waiting in the patrol car, and not in response to any question, Penry told Nelson three times that he did not commit the crime. After they had been at the Carpenter home for approximately forty-five minutes, Penry told Nelson "that he wanted to get it off of his conscience." (S.F. Vol 43, p. 303). Nelson, believing Penry was to going to reiterate his innocence, told Penry to "be quiet." (*Id.*). Penry then said that he had "done it." (*Id.*, p. 304).

The officers brought Penry into the Carpenter home. Penry "point[ed] out things" before they reached the house and told Nelson "about the door that he had entered." (*Id.*, p. 305). Inside the house, Penry "explained everything in detail." (*Id.*, p. 306).

The officers drove Penry back to the Livingston police station. Penry was taken before Justice of the Peace Garnet Galloway, who read Penry his magistrate warnings, which are similar to *Miranda* warnings. Before Penry signed the warnings, Penry's father entered the courtroom and read Penry his *Miranda* rights. (1980 S.F.

Vol. 4, pp. 184, 204-07). Penry's father then asked Penry if he had committed the crime. Penry answered "yes."

Penry gave a written confession that afternoon and a second written confession the next day, both in narrative form. In the confessions, Penry stated that he had first met Carpenter three weeks earlier when he had helped "a guy named Harold" move some heavy appliances into Carpenter's home. Penry stated that he returned to Carpenter's home on October 25th, entered the house, and threatened Carpenter with his pocketknife. Carpenter fought with Penry, knocking the pocketknife out of Penry's hand and stabbing Penry in the back with a pair of scissors. Penry described subduing Carpenter, kicking and "stomping her," raping her, and stabbing her with the scissors. (1990 Jury Trial; State's Exhibit No. 48-A, p. 3). Penry then returned to his father's house.

At the trial, the State presented testimony from Harold Stubblefield. On October 9, 1979, Stubblefield had hired Penry to help install a freezer and stove in Carpenter's home. Stubblefield testified that Carpenter was present when he and Penry installed the appliances. The State also presented testimony from a forensic pathologist that the puncture wounds in Penry's back were consistent with wounds that could have been caused by the scissors found in Carpenter's home. The forensic pathologist also

testified that a large bruise on Carpenter's chest was consistent with an injury that could have been caused by a pair of boots obtained from Penry.

In his defense, Penry presented medical records documenting his mental retardation,[4] possible organic brain damage, and evidence he described as showing his desire to please authority figures. Penry also presented testimony from one of the officers that picked up Penry at his father's house on October 25, 1979. That officer testified that Penry put on shoes, rather than boots, when they left to go to the police station. Penry concluded with the testimony of Dr. Roberto Bayardo, a forensic

---

[4] In *Penry* I, the Supreme Court described the mitigating evidence of mental retardation that Penry had presented to the jury during the sentencing phase of his first trial. The Court noted the evidence of mental retardation:

- As a child, Penry was diagnosed as having organic brain damage.
- Penry scored between 50 and 63 on IQ tests taken at different times, indicating "mild" or "moderate" mental retardation.
- Penry was evaluated as having the "mental age" of a 6-1/2 year old.
- Penry's "social maturity" was that of a 9 or 10 year old.
- Penry's mother, Shirley Penry, testified that Penry "was unable to learn in school and never finished the first grade."
- Penry was "in and out of a number of state schools and hospitals" until he was twelve years old, when he stopped attending school.
- Penry's aunt "struggled for over a year to teach Penry how to print his name."

Penry I, 109 S. Ct. at 2941-42.

pathologist. Dr. Bayardo testified that Penry's boots were unlikely to have caused the bruise on Carpenter's chest.

The State offered Dr. Fred Fason as a rebuttal witness. Dr. Fason testified that Penry had an antisocial personality, a factor that could lower the scores Penry obtained on IQ tests. Dr. Fason testified that such a personality would cause Penry to rebel against, rather than submit to, authority. Dr. Fason testified that he believed Penry did not have significant brain damage or mental retardation; Penry possessed the intellectual capacity to understand *Miranda* warnings and to waive those warnings in a knowing and intelligent manner; and Penry had the capacity to act intentionally.

During the sentencing phase of the retrial, the prosecution offered testimony from five prison guards and a deputy sheriff that Penry demonstrated aggressive and dangerous behavior in prison and while in custody during his first trial in 1980. The prosecution also offered testimony from Maurice Cook, the Texas Ranger who took Penry's second confession; from a woman mentioned in Penry's second confession as someone he had wanted to rape; and from a woman Penry was convicted of raping in 1977.

Penry presented Dr. Randall Price, a clinical neuropsychologist, who testified that he believed Penry suffered from organic brain impairment and mental retardation. Dr. Price testified that organic brain impairment can reduce the ability to

control behavior and impulses. One of Penry's childhood teachers testified that Penry was retarded and did not fake his retardation. Penry also presented additional medical records regarding his brain damage, mental retardation, and behavioral problems throughout his childhood and adolescence.

Several of Penry's relatives and childhood neighbors testified to Penry's childhood abuse. This evidence included testimony by Penry's sisters, Belinda Anderson and Trudy Ross; Penry's aunts, Lucille Anderson, Marilyn Barnet, and Patsy Ross; and Penry's neighbors, Carolyn Ward and Billie Johnson. The jury heard the following testimony:

- When Penry was ten months old, Penry's mother, Shirley Penry, "sock[ed]" Penry "right in the mouth" when he was sitting in his highchair. (1990 S.F. Vol. 48, p. 1165).

- When Penry was older, Shirley Penry beat her son almost every day, using belt buckles, belts, brooms, toy brooms, sticks, mop sticks, switches, and her fists. Shirley Penry would "stomp on" Penry, try to "claw[]" Penry, threaten to "scratch his little eyeballs out," hit Penry in the head with a shoe, put cigarettes out on Penry's skin, hold Penry's head under water, and make Penry stand in front of a heater until his legs blistered. (*Id.*, pp. 1086, 1088, 1113-15, 1264). When Penry was four years old, Shirley Penry placed him in boiling water that caused scarring from his waist down. (*Id.*, pp. 1125, 1261-62). Shirley Penry "[stood] there" as Penry screamed. (*Id.*, p. 1125).

- Shirley Penry would lock Penry in his room for up to twelve to fourteen hours without food or water, and sometimes for days at a time. (*Id.*, pp. 1083, 1116). When Penry was forced to defecate

in his room or the attic, Shirley Penry would beat him. (*Id.*, pp. 1262-63, 1271). On occasion, Shirley Penry forced Penry to drink his own urine and to eat his own feces. (*Id.*, pp. 1089-91, 1115-16).

- Neighbors heard "terrified screams, pleading screams" coming from the Penry household. (*Id.*, p. 1249).

- Shirley Penry verbally abused Penry, making comments such as "I ought to just drowned you, you little bastard" and calling him "short little bastard" and "mother-fucker." On one occasion, Shirley Penry grabbed a knife and threatened to cut off Penry's penis. (*Id.*, pp. 1085-86, 1088, 1118).

The prosecution offered Dr. Walter Quijano and Dr. Stanton Samenow as rebuttal witnesses. Dr. Quijano testified that he did not believe that Penry was mentally retarded, had brain damage, or lacked the capacity to control his impulses. Dr. Quijano and Dr. Samenow both testified that Penry had an antisocial personality and would be a danger in the future. Dr. Samenow testified that Penry could control himself and could act deliberately.

Based on this evidence and the court's instructions, the jury found Penry guilty of capital murder and sentenced him to death. In this habeas petition, Penry challenges some of the evidence presented, some of the evidence excluded, and the court's instructions.

III. The Applicable Legal Standards

A. The Antiterrorism and Effective Death Penalty Act

Penry filed this habeas petition on March 2, 1998; the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs. *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997); *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1845 (1998); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997). The AEDPA provides that a federal habeas petition shall not be granted with respect to any claim adjudicated on the merits in state court[5] unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(1)-(2). The AEDPA further provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a

---

[5] In *Nobles*, the court noted that before applying the AEDPA standards, the court must determine whether the petitioner's claim was adjudicated on the merits in state court proceedings. *Nobles*, 127 F.3d at 416. Penry does not contend that his claims were not adjudicated on the merits in state court. In *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *overruled on other grounds by Lindh*, 117 S. Ct. at 2059, the Fifth Circuit held that a claim is adjudicated on the merits if, as here, the state court in post-conviction proceedings has entered findings of fact and/or conclusions of law on the issue.

> factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

Section 2254(d) establishes different standards of review for questions of fact, questions of law, and mixed questions of law and fact. Federal courts reviewing factual determinations may grant relief only if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence." *Drinkard v. Johnson*, 97 F.3d 751, 767 (5th Cir. 1996) (quoting 28 U.S.C. § 2254(d)(2)), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled on other grounds by Lindh*, 117 S. Ct. at 2059. In reviewing a question of law, a federal court may grant habeas relief only if it determines that a state court's decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court." *Id.* at 768 (quoting 28 U.S.C. § 2254(d)(1)). In reviewing a mixed question of law and fact, "a federal court may grant habeas relief only if it determines that the state court decision rested on 'an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court' to the facts of the case." *Id.* at 767-68 (quoting 28 U.S.C. § 2254(d)(1)) (alteration in original); *see also Nobles*, 127 F.3d at 416.

The "unreasonable application" standard requires more than a simple disagreement with a state court decision. *Drinkard*, 97 F.3d at 768. An application of law to facts is "unreasonable 'only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect.'" *Jones v. Jones*, 163 F.3d 285, 303 (5th Cir. 1998) (citing *Cain*, 125 F.3d at 277). A state court decision will not be reversed if the decision is a reasonable, good faith application of Supreme Court precedent. *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997). A review of mixed questions of law and fact is "most closely akin to the traditional 'clearly erroneous' standard." *Id.* at 1267.

B. Procedural Default and Procedural Bar

"A procedural default . . . occurs when a prisoner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" *Nobles*, 127 F.3d at 420 (quoting *Coleman v. Thompson*, 111 S. Ct. 2546, 2557 n.1 (1991)). To exhaust state remedies, a habeas petitioner "must have provided the state courts with a 'fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.'" *Id.* (quoting *Anderson v. Harless*, 103 S. Ct. 276, 277 (1982)); *see also Shute v. Texas*, 117 F.3d 233, 237

(5th Cir. 1997) ("To exhaust available state remedies, a habeas petitioner 'must fairly apprise the highest court of his state of the federal rights which were allegedly violated.'" (quoting *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993))).

Texas courts considering unexhausted claims on a successive habeas petition would find them procedurally barred. Article 11.071 § 5(a) of the Texas Code of Criminal Procedure prohibits a Texas court from considering a successive habeas petition on the merits unless the petition satisfies one of the exceptions set forth in § 5(a)(1), (2), or (3).[6] The Texas Court of Criminal Appeals has applied article 11.071

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[6] Article 11.071 § 5(a) provides:

> (a) If an initial application for a writ of habeas corpus is untimely or if a subsequent application is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent or untimely initial application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable: (A) on the date the applicant filed the previous application; or (B) if the applicant did not file an initial application, on or before the last date for the timely filing of an initial application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

to bar the presentation of new issues in successive petitions when the claimant's original petition was filed before the statute's effective date of September 1995. *Ex parte Davis*, 947 S.W.2d 216, 221 (Tex. Crim. App. 1996) (en banc). The Fifth Circuit has held that article 11.071 is an adequate state procedural bar, finding that the rule is strictly and regularly enforced. *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998). The Texas abuse of the writ doctrine is also an adequate state procedural bar for the purpose of federal habeas review. *Nobles*, 127 F.3d at 423; *see also Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995).

In addition to the exhaustion issue, claims for federal habeas relief are procedurally barred if they were defaulted in the state court proceedings. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 111 S. Ct. at 2565; *see also Muniz*, 132 F.3d at 220.

"'In order to prove a fundamental miscarriage of justice, the prisoner must assert his actual innocence.'" *Muniz*, 132 F.3d at 221 n.12 (quoting *Glover v. Cain*, 128 F.3d 900, 904 (5th Cir. 1997)); *see also Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998). In *Sawyer v. Whitley*, the Supreme Court held that a petitioner attempting to assert a procedurally defaulted challenge to his death sentence may overcome the default by showing that he is "'actually innocent' of the death penalty." 112 S. Ct. 2514, 2517 (1992). The petitioner must "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty." *Id.* at 2525.

The *Sawyer* actual innocence exception is limited to factual innocence. *See Callins v. Johnson*, 89 F.3d 210, 215 (5th Cir. 1996); *Fearance*, 56 F.3d at 637-38. In *Callins*, the Fifth Circuit held that even if a mentally retarded person was constitutionally ineligible for the death penalty, that individual is not "actually innocent" under *Sawyer*. 89 F.3d at 215. Penry's argument that he may assert procedurally defaulted claims because he is mentally retarded and, therefore, "actually innocent" of the death penalty, is barred by Fifth Circuit precedent.

Each of Penry's claims is examined under the AEDPA.

IV. The Jury Instructions on Mitigating Evidence (Claim I)

At the close of the sentencing phase of Penry's 1980 trial, the jury imposed the death penalty by unanimously answering "yes" to the three "special issues" set out in the Texas Code of Criminal Procedure at article 37.071(b). The Supreme Court in *Penry* I determined that none of the three "special issues" clearly provided a means for the jury to give effect to Penry's mitigating evidence. *Penry*, 109 S. Ct. at 2949. The Supreme Court stated:

> [I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

Id. at 2952.

At the conclusion of the sentencing phase of the 1990 trial, the court again submitted the same Texas statutory special issues that the jury had answered in *Penry* I:

> Special Issue No. 1
>
> Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Trans. Vol. 5, pp. 1330-31).

Unlike *Penry* I, however, the trial court on retrial also gave the following instructions:

You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and

record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329).

Penry argues that even with the added instructions, the special issues did not allow the jury to consider Penry's retardation and childhood abuse in deciding whether to answer "yes" or "no." Penry contends that if the jurors wished to give effect to the mitigating evidence, the trial court's instruction forced them to lie when answering the special issues and to violate their oaths to answer the special issues truthfully. Penry argues that the mitigating evidence instruction was merely a "nullification instruction" that did not cure the *Penry* I constitutional error.

The Texas Court of Criminal Appeals, on Penry's direct appeal, considered and rejected this claim, holding that the "nullification instruction . . . is sufficient to meet the constitutional requirements of *Penry v. Lynaugh*." *Penry*, 903 S.W.2d at 765. Whether a jury instruction placed relevant mitigating evidence beyond

the reach of the jurors is a mixed question of law and fact. *Drinkard*, 97 F.3d at 768-69. In this case, the state court's ruling is not an unreasonable application of clearly established federal law.

In *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), the Supreme Court articulated the standard for determining whether jury instructions adequately permit a jury to consider and give effect to mitigating evidence: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 761 (quoting *Boyde v. California*, 110 S. Ct. 1190, 1198 (1990)). A court addresses this issue by considering "the entire context in which the instructions were given." *Buchanan*, 118 S. Ct. at 762; *see also Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993). "In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson v. Texas*, 113 S. Ct. at 2669 (quoting *Boyde*, 110 S. Ct. at 1198). "A *Penry* claim does not arise when constitutionally relevant evidence 'can be given mitigating effect *in some way* under the Texas special issues.'" *Davis v. Scott*, 51 F.3d 457, 464 (5th Cir. 1995) (quoting *Motley v. Collins*, 18 F.3d 1223, 1234 (5th Cir. 1994)) (emphasis in original).

Both the Supreme Court and the Fifth Circuit have held that jury arguments explaining how mitigating evidence can or should be considered in sentencing affect whether the jury was reasonably likely to have applied the instructions to prevent consideration of relevant mitigating evidence. *See Buchanan*, 118 S. Ct. at 762-63; *Drinkard*, 97 F.3d at 761 n.16. The Supreme Court has also noted that a defendant's presentation of extensive mitigating evidence is likely to convey to the jury that they may take the evidence into account in sentencing. *See Johnson v. Texas*, 113 S. Ct. at 368; *Boyde*, 110 S. Ct. at 1199-1200.

The record of Penry's 1990 trial supports the state appellate court's conclusion that the jury was able to give constitutionally sufficient consideration to Penry's mitigating evidence. During the voir dire examination of the venire in the 1990 trial, the prosecutor told the venire that they could answer one of the special issues "no" if they felt that Penry's mitigating evidence warranted a life sentence:

> Another area, in fact, that a jury can take into consideration is what we refer to loosely sometimes as mitigating evidence. There is not a separate question on mitigating evidence, but you will probably receive some sort of an instruction from the Judge, concerning mitigating evidence. . . . [F]urthermore, if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death, that it would warrant a life

> sentence instead of death, then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

(S.F. Vol. 15, pp. 186-87).

During closing argument in the sentencing phase, defense counsel emphasized this point:

> You are going to get just three yes or no questions. You are not going to get any questions about mitigating circumstances. Three questions called Special Issues, and none of them say anything about mentally retarded, none of them say anything about child abuse, but, the Judge told you, he told you that when you answer those questions you are to give affect [sic] and consideration to mitigating circumstances. If you determine, when giving affect [sic] to the mitigating evidence, if any, that a life sentence is reflected by a negative finding of the issue under consideration, rather than the death sentence, appropriate response to the personal culpability of the Defendant, then, a negative finding should be given to one of the Special Issues.

(S.F. Vol. 51, pp. 1902-03). Defense counsel then explicitly told the jury that they were able to answer "no" to one of the special issues despite the fact that a "no" answer was not the "literally correct" answer:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if

> you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all of this time with you to make sure that you understand what it says. If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

(*Id.*, p. 1903).

The court's instruction on the effect of mitigating evidence tracked *Penry* I by "informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." The instruction went further, informing the jurors that they should answer one of the special questions "no" if they believed that Penry's personal culpability warranted a life sentence instead of death. Both the prosecutor and defense counsel told the jurors that they were able to answer one of the special issues "no" if they believed Penry's mitigating evidence warranted a life sentence, even if that answer was not "literally correct."

The Fifth Circuit recently approved a mitigating evidence instruction very similar to the instruction given to Penry's jury. In *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), the petitioner was sentenced to death under the version of the Texas Code of Criminal Procedure article 37.071 used in Penry's trial and retrial. The trial court in *Emery* gave an instruction which was virtually identical to that given by the trial court

at Penry's retrial. The Fifth Circuit upheld the instruction against the petitioner's *Penry* challenge, stating:

> This instruction allowed the jury to consider any appropriate mitigating circumstance, including a history of child abuse, and required the jury not to sentence Emery to death if a life sentence was appropriate in light of his moral culpability. The instruction adequately addressed the Court's concerns about Texas's death penalty scheme by giving the jury the ability to consider any appropriate mitigating circumstance.

Id. at 200. The Fifth Circuit's ruling in *Emery* supports the state court's conclusion as to Penry's first claim.

The state appellate court's conclusion that the trial court's instructions on mitigating evidence were constitutional is consistent with, and not an unreasonable application of, clearly established federal law. This court DENIES Penry's claim that the trial court's instructions did not permit the jury to consider and give effect to his mitigating evidence of mental retardation and childhood abuse.

V. The Eighth Amendment and an Emerging National Consensus (Claims II and III)

In *Penry* I, Penry argued that the execution of a mentally retarded person "like himself with a reasoning capacity of approximately a 7-year-old would be cruel and unusual [punishment] because it is disproportionate to his degree of personal culpability." *Penry* I, 109 S. Ct. at 2956. The Supreme Court rejected this argument,

holding that sentencing juries are able to evaluate sufficiently whether the extent of a particular defendant's mental retardation reduces his culpability to justify declining to impose a death sentence.

In *Penry* I, Penry also argued that "there is objective evidence . . . of an emerging national consensus against execution of the mentally retarded, reflecting the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 2955 (quoting *Trop v. Dulles*, 78 S. Ct. 590, 598 (1958)). The Supreme Court rejected this argument, finding insufficient evidence of a national consensus against execution of the mentally retarded to make it unconstitutional. *Id.* The Court held that the execution of a mentally retarded person would not violate the Eighth Amendment as long as the sentencing jury could consider and give effect to the nature and extent of the defendant's mental retardation in each case. *Id.* at 2958.

In his present petition, Penry again argues that the execution of a mentally retarded person violates the Eighth Amendment. Penry argues that since *Penry* I, a national consensus against execution of the mentally retarded has developed. Penry argues that this emerging national consensus against execution of the mentally retarded also "establishes a societal consensus against . . . the execution of persons exhibiting a certain level of mental retardation." Penry relies on new evidence, not presented in *Penry* I, to argue that current community views prohibit the execution of all mentally

retarded persons. Penry also relies on this new evidence to argue that the execution of an individual with his level of mental retardation is constitutionally prohibited.

This court considers both of Penry's arguments below.

A. The "Categorical" Challenge to the Death Sentence (Claim III)

Respondent argues that Penry's claim that the Eighth Amendment categorically prohibits execution of mentally retarded individuals is procedurally barred because, although Penry argued in state court that his execution would be unconstitutional because of *his* level of intelligence and background, he did not argue that execution of *any* mentally retarded person was categorically prohibited. Penry's direct appeal to the Court of Criminal Appeals did not contain an argument that "evolving standards of decency" categorically prohibit execution of any mentally retarded person. In his direct appeal, Penry did not cite or rely upon evidence of an evolving national standard forbidding execution of any mentally retarded individual. In contrast, Penry explicitly relies upon such evidence to support both of his arguments before this court. Penry also failed to raise this claim in his state habeas application. (Petition for a Post-Conviction Writ of Habeas Corpus, *Ex parte Penry*, Cause No. 15,977-C).

Penry did not give the Texas Court of Criminal Appeals a "'fair opportunity' to apply controlling legal principles to the facts bearing upon his . . .

claim" that the Eighth Amendment categorically bars execution of the mentally retarded. The claim is procedurally barred.[7]

Even if the claim was not procedurally barred, this court would reject the claim on its merits. Penry argues that there is sufficient objective evidence of a national consensus against execution of mentally retarded persons to enable a court to find that permitting the State of Texas to execute Penry would violate the "evolving standards of decency" that the Eighth Amendment protects. Penry has a "heavy burden" to show the national consensus he asserts. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977 (1989) (quoting *Gregg v. Georgia*, 96 S. Ct. 2909, 2926 (1976)).

In considering this argument in *Penry* I, the Supreme Court required an "objective indicator of contemporary values upon which we can rely," such as the "judgment of legislatures and juries." *Penry* I, 109 S. Ct. at 2955-56. The *Penry* I Supreme Court considered the following evidence:

- a federal criminal statute, the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (1988), prohibiting the execution of a mentally retarded person;

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[7] This court does not find Penry's claim to be barred by the law of the case doctrine. Penry's evidence of national opposition to the execution of the mentally retarded arose after *Penry* I and demonstrates more extensive opposition to execution of the mentally retarded than was shown in *Penry* I. *See Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 735 (5th Cir. 1997) (noting that the law of the case doctrine does not bar adjudication of a claim presented in a previous appeal if the "evidence in a subsequent trial was substantially different").

- one state, Georgia, banned the execution of a mentally retarded person;
- one state, Maryland, had enacted a statute banning the execution of a mentally retarded person to take effect on July 1, 1989;
- public opinion polls taken in Texas, Florida, and Georgia, showing public opposition to execution of the mentally retarded; and
- a resolution of the American Association on Mental Retardation opposing execution of the mentally retarded.

Id. at 2955.

The Supreme Court found that this evidence, combined with evidence that fourteen states did not allow the death penalty under any circumstances, was insufficient to show a national consensus against execution of the mentally retarded. *Id.* The Supreme Court found that public opinion polls expressing disapproval of the execution of mentally retarded persons and the opposition of the American Association on Mental Retardation were not sufficiently reliable indicators of a national consensus to allow the Court to find the execution of mentally retarded persons categorically prohibited by the Eighth Amendment. "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely." *Id.*

Penry now offers evidence that the federal government and twelve of the thirty-eight states that allow capital punishment specifically exempt the mentally

retarded from the death penalty. *See* Violent Crime Control and Law Enforcement Act, 18 U.S.C. § 3596(c); Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(*l*); ARK. CODE ANN. § 5-4-618(b); COLO. REV. STAT. § 16-9-403; GA. CODE ANN. § 17-7-131(j); IND. CODE ANN. § 35-36-9-6; KAN. STAT. ANN. § 21-4623(d); KY. REV. STAT. ANN. § 532.140; MD. ANN. CODE of 1957, art. 27 § 412(g); NEB. REV. STAT. ANN. § 28-105.01(2); N.M. STAT. ANN. § 31-20A-2.1(B); N.Y. CRIM. PROC. LAW § 400.27(12); TENN. CODE ANN. § 39-13-203(b); WASH. REV. CODE ANN. § 10.95.030(2). Twelve additional states and the District of Columbia do not allow capital punishment under any circumstances.[8]

The Supreme Court has found the application of the death penalty to a particular class of persons inconsistent with "evolving standards of decency" in cases in which only a small number of states permitted the challenged application of the death penalty. *See Ford v. Wainwright*, 106 S. Ct. 2595, 2601 (1986) (no states permitted

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[8] Penry also cites two states in which bills prohibiting execution of mentally retarded persons are pending in the state legislature. *See* H.B. 2544, 43rd Leg. (Ariz. 1998) and H.B. 1288, 89th Leg., 2d Reg. Sess. (Mo. 1998). Both bills were introduced on January 13, 1998. Though neither bill was enacted into statute, both states have similar bills pending in their 1999 legislative sessions. *See* H.B. 2539, 44th Leg. (Ariz. 1999); H.B. 425, 90th Leg., 1st Reg. Sess. (Mo. 1999). Several other states, including Texas, are considering similar bills in their 1999 legislative sessions. *See, e.g.*, H.B. 2121, 76th Leg. (Tex. 1999); S.B. 180, 181st Leg. (Mass. 1999); H.F. 26, 78th Leg., 1st Sess. (Iowa 1999); S.B. 188, 74th Leg. (S.D. 1999).

Penry also cites two states that by statute allow capital punishment but have not executed any prisoners since the Supreme Court upheld the constitutionality of capital punishment in *Gregg v. Georgia*, 96 S. Ct. 2909, 2923 (1976), and do not have any prisoners currently on death row. Penry argues that these states have "implicitly rejected" capital punishment.

execution of the legally insane); *Enmund v. Florida*, 102 S. Ct. 3368, 3374 (1982) (only eight states permitted capital punishment for participation in a robbery in which an accomplice kills a person); *Coker v. Georgia*, 97 S. Ct. 2861, 2867-68 (1977) (only one state permitted capital punishment for the crime of rape of an adult woman); *see also Thompson v. Oklahoma*, 108 S. Ct. 2687, 2695-96 (1988) (no state that set minimum age limits on imposition of the death penalty permitted the execution of those who committed capital murder at age fifteen or younger).

In cases in which the Court has found that imposing the death penalty on a particular category of persons did not offend evolving standards of decency, over half the states that permitted capital punishment allowed execution of that category of persons. In *Stanford*, the Supreme Court considered whether imposing the death sentence on a sixteen or seventeen year-old defendant violated the Eighth Amendment. The Court noted that "[o]f the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders." *Stanford*, 109 S. Ct. at 2975. The Court concluded that "a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above." *Id.* at 2976. The Court relied on this empirical result in finding that the Constitution did not forbid such punishment. In *Tison v. Arizona*, 107 S. Ct. 1676, 1686 (1987), the Court upheld Arizona's imposition of the death penalty for a

defendant convicted of being a major participant in a felony with reckless indifference to human life, when eleven states that permitted capital punishment forbade the challenged imposition of the death penalty.

The record before this court shows that twenty-six of the thirty-eight states that permit capital punishment allow execution of the mentally retarded.[9] Under the Supreme Court precedents, this level of acceptance in the state legislatures does not provide the objective support for Penry's argument necessary before a court may find a violation of the Eighth Amendment on the ground of an emerging national consensus.

Penry also submits evidence from polls finding that jurors are less likely to sentence a defendant to death if the defendant is mentally retarded and evidence that relatively few mentally retarded persons have been executed since 1976. This evidence does not show that jurors or prosecutors are categorically opposed to the execution of all mentally retarded persons. Rather, the evidence supports the ability of jurors to give

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[9] The *Stanford* Court explicitly rejected the argument that the number of states permitting the challenged application of the death penalty should be compared to the number of states overall, including those that do not allow the death penalty at all. *Stanford*, 109 S. Ct. at 2975-76 n.2. The Court also rejected the argument that the fact that the federal government has made a class of individuals ineligible for the death penalty is determinative of a national consensus. *See id.* at 2977 ("[E]ven if it were true that no federal statute permitted the execution of persons under 18, that would not remotely establish—in the face of a substantial number of state statutes to the contrary—a national consensus that such punishment is inhumane, any more than the absence of a federal lottery establishes a national consensus that lotteries are socially harmful.").

effect to a particular defendant's mental retardation as a mitigating circumstance in sentencing. *See Stanford*, 109 S. Ct. at 2977.

In *Penry* I, the Supreme Court rejected Penry's evidence of public opinion polls and statements from professional associations expressing opposition to execution of mentally retarded persons as insufficient to show a national consensus against the application of the death penalty to a particular class of persons. *Penry* I, 109 S. Ct. 2955. The evidence in *Penry* II portrays a growing disapproval of the execution of the mentally retarded. However, the Supreme Court has not held that evidence of a trend against a particular application of the death penalty is sufficient to enable a court to find that application "cruel and unusual." *See Stanford*, 109 S. Ct. at 2975-76 (requiring the petitioner to establish a "*degree* of national consensus . . . sufficient to label a particular punishment cruel and unusual" (emphasis added)); *id.* at 2977 (stating that the petitioner has a "'heavy burden' . . . to establish a national consensus" against an application of the death penalty); *id.* (noting that the petitioner had not established a "settled consensus"); *Penry* I, 109 S. Ct. at 2955 (noting that although Penry's public opinion and professional association evidence may "ultimately find expression in legislation," the evidence had failed to establish a present "national consensus").

Penry's arguments and data do not respond to a fundamental problem the Supreme Court identified with the "categorically ineligible" approach Penry advances.

In *Penry* I, the Supreme Court noted that a categorical prohibition against imposing a punishment against all retarded persons but permitting the same punishment for others had a troubling and dangerous consequence. The Court noted that "[m]entally retarded persons are individuals whose abilities and experiences can vary greatly," *Penry* I, 109 S. Ct. at 2957, as can their ability to bear personal culpability for their actions. The Court recognized the difficulty, and danger, in reducing all mentally retarded individuals to a single category. Such a categorical approach could improperly limit hard-won opportunities for retarded persons to participate fully in events requiring legal recognition, such as marriage or making contracts. *Id.* at 2958. Penry does not address the difficulty inherent in his argument.

Penry's evidence is not sufficient to permit this court to find that there currently exists a "national consensus" against execution of mentally retarded persons, making such executions unconstitutional. Penry is not entitled to federal habeas relief on this claim, both because it is procedurally barred and on the merits. This court DENIES Penry's claim that the execution of any mentally retarded person violates the Eighth Amendment's prohibition of "cruel and unusual" punishment.

B. The Particularized Challenge to the Death Sentence (Claim II)

In his federal petition for habeas relief, Penry reiterates the argument he made on direct appeal in state court, that the degree and nature of his mental retardation

and history of childhood abuse make him insufficiently culpable to permit his execution. Respondent asserts that the claim is barred by 28 U.S.C. § 2244(b)(1) as a successive petition because the Supreme Court considered and rejected it in *Penry* I.

Section 2244(b)(1) states: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." The AEDPA does not alter the pre-AEDPA definition of a ""second or successive' petition." *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997). Circuits that have considered the issue have held that a claim in a habeas petition filed after a retrial and second conviction is not treated as presented in a "second" or "successive" petition if it attacks only the second conviction or sentence. *See, e.g.*, *Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997); *Pratt v. United States*, 129 F.3d 54, 62 (1st Cir. 1997); *Palmer v. Clarke*, 961 F.2d 771, 774-75 (8th Cir. 1992). Penry's claim that the evidence of the nature and extent of his mental impairment presented in the 1990 retrial makes the death sentence he received unconstitutional is not barred by section 2244(b)(1).

Respondent alternatively argues that this court is barred from considering Penry's argument by the "law of the case" doctrine. The doctrine of the law of the case is inapplicable because additional evidence, not presented in his first trial, provides changed factual support for Penry's claim. *Society of the Roman Catholic Church of*

the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co., 126 F.3d 727, 735 (5th Cir. 1997). Penry's claim is not barred by the law of the case doctrine.

On Penry's direct appeal, the Texas Court of Criminal Appeals noted that the "Eighth Amendment does not preclude the execution of mentally retarded persons," citing *Penry* I. *Penry*, 903 S.W.2d at 766. The Texas appellate court stated further that there is no "authority stating that it is unconstitutional to execute persons who have brain damage or were abused as children." *Id.* at 766-67. Again citing *Penry* I, the Texas court concluded that the Eighth Amendment was satisfied because Penry's sentencing jury had the "means to consider all of the evidence, including [Penry's] mitigating circumstances, and yet determined that death was the appropriate punishment." *Id.* at 767. The state court's decision on this mixed question of law and fact is not an unreasonable application of federal law as clearly established by the United States Supreme Court.

In his second trial, Penry presented Dr. Randall Price as a witness. Dr. Price drew an explicit link between what he believed to be Penry's organic brain damage and Penry's inability to control himself or use good judgment. (S.F. Vol. 48, pp. 1337-38). Penry also presented far more graphic and extensive evidence of the abuse he suffered as a child than had been presented in his first trial. Penry's new evidence of childhood abuse included evidence that he had suffered more frequent and

more violent physical, mental, and psychological abuse than had been apparent from the evidence introduced in his first trial.

In *Penry* I, the Supreme Court held that the constitutional requirements are met when a jury is able to consider and give effect to mitigating evidence that may show that a particular defendant cannot be held culpable for his actions. *Penry* I, 109 S. Ct. at 2958. In Penry's second trial, the jury heard extensive mitigating evidence, argument, and instructions. The jury was able to consider whether Penry's mental retardation and his childhood abuse lessened Penry's culpability to a level at which the death penalty was not an "appropriate punishment."

This court finds that, considering the additional mitigating evidence Penry presented in his second trial, the Texas Court of Criminal Appeals' conclusion that the execution of someone with Penry's level of mental retardation and history of childhood abuse does not violate the Eighth Amendment was not an unreasonable application of federal law. This court DENIES Penry's request for habeas relief based on Claim II.

C. The Combination of Claims II and III

Penry characterizes Claim II as dependent on his new evidence of a national trend toward disapproval of execution of the mentally retarded. "[I]t may be possible that this objective evidence establishes a societal consensus against only the execution of persons exhibiting a certain level of mental retardation." (Docket Entry

No. 28, p. 21). This argument is not barred by the law of the case doctrine because it is narrower than the categorical Eighth Amendment argument the Supreme Court considered in *Penry* I and because it relies on "substantially different" evidence. Because it attacks a second conviction, Penry's habeas petition is not governed by rules restricting the consideration of successive petitions. Penry's claim is not barred by 28 U.S.C. § 2244(b)(2), which forecloses consideration of a claim presented in a successive petition that was not presented in a prior petition, because the claim relies on evidence of an alleged national consensus developed since Penry's first habeas petition.

Penry did not, however, present this claim to the Texas courts on appeal or during the state habeas proceedings. Indeed, Penry did not articulate this argument until his reply. Respondent did not have an opportunity to raise a procedural default bar to the argument. This court is not required to raise a procedural default *sua sponte*. *See Trest v. Cain*, 118 S. Ct. 478, 480 (1997) ("We are not aware of any precedent stating that a habeas court must raise [a procedural default] where the State itself does not do so."). While a district court may exercise its discretion to raise a procedural default *sua sponte*, *Magouirk v. Phillips*, 144 F.3d 348, 357 (5th Cir. 1998), this court concludes that it should not avoid the merits of Penry's "combination" claim by raising a procedural default bar.

This court finds that Penry's new evidence of the degree of his mental retardation and the effects of the childhood abuse he suffered, in combination with the previously available evidence, is not sufficient to raise a fact issue that a national consensus has developed, making it unconstitutional to execute such an individual. Penry's summary judgment evidence does not provide the objective support necessary to create a fact issue that a national consensus against the execution of a person with Penry's level and degree of mental capability has developed, requiring a finding of a constitutional violation. Summary judgment in favor of respondent on this claim is appropriate. *See, e.g.*, *Goodwin v. Johnson*, 132 F.3d 162, 169 (5th Cir. 1997) (applying the Rule 56 summary judgment standard to a capital defendant's habeas petition).

This court DENIES Penry's claim that his execution violates the Eighth Amendment because there exists a national consensus against applying the death penalty to an individual with Penry's level of mental retardation and background of abuse.

VI. The *Simmons* Claim (Claim IV)

In *Simmons v. South Carolina*, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that when a capital murder defendant would be ineligible for parole under state law if sentenced to life imprisonment, and the prosecution argues that the

defendant would be dangerous in the future, due process requires the jury to be informed that the defendant would be ineligible for parole. The Fifth Circuit has rejected the extension of the *Simmons* rule to a Texas capital defendant. Under Texas law, a capital defendant is not legally ineligible for parole. In *Allridge v. Scott*, the Fifth Circuit held that *Simmons* applies only to situations in which the defendant is "legally ineligible" for parole.[10] 41 F.3d 213, 222 (5th Cir. 1994); *see also Boyd v. Johnson*, No. 97-10823, 1999 WL 71660, at *5 (5th Cir. Feb. 12, 1999) (to be published in F. 3d.); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir. 1998); *Woods v. Johnson*, 75 F.3d 1017, 1037 (5th Cir. 1996); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995).

It is undisputed that Penry would have been legally eligible for parole had he been sentenced to life imprisonment. However, during the sentencing phase of the retrial, Penry offered into evidence his signed statement purporting "to give up [his]

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[10] Penry argues that this court should not follow the *Allridge* line of cases in light of an opinion joined by four Justices of the Supreme Court dissenting from the denial of a petition for writ of *certiorari* in *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J., dissenting from the denial of petition for a writ of *certiorari*). In his opinion, Justice Stevens noted that there was an "obvious tension" between *Simmons* and the refusal by the State of Texas to allow a defendant to give the jury truthful information about his parole eligibility. *Id.* at 355. An opinion dissenting from the denial of a petition for writ of *certiorari* does not have precedential value. The Fifth Circuit cases on point, based on Supreme Court majority opinions, are binding on this court. *See Teague v. Lane*, 109 S. Ct. 1060, 1067-68 (1989). The Fifth Circuit has recognized, but specifically declined to apply, Justice Stevens' dissenting opinion in an opinion addressing a *Simmons* claim. *See Muniz*, 132 F.3d at 224 n.22 (citing Justice Stevens' dissenting opinion as "*but cf.*").

right to parole for the rest of [his] life." The trial court sustained the prosecutor's objection to the introduction of this statement and excluded Penry's statement from evidence. (S.F. Vol. 50, pp. 1600-02).

During the sentencing phase of the trial, the court instructed the jury not to consider the possibility of parole in determining Penry's sentence. (Trans. Vol. 5, p. 1328; S.F. Vol. 51, pp. 1915-16). In his closing argument, the prosecutor argued that Penry would be a future danger to society. (S.F. Vol. 51, pp. 1946-47). After closing arguments, immediately after the jury began to deliberate, Penry's counsel objected to the prosecutor's future dangerousness argument and moved for a mistrial. (*Id.*, pp. 1948-49). The trial court overruled Penry's objection and denied his motion. (*Id.*, p. 1949).

Penry argues that the trial court erred by permitting the prosecutor to argue that Penry would be a future danger to society while denying Penry the opportunity to present evidence that parole was at least highly unlikely. Penry appears also to challenge the trial court's refusal to give Penry's requested jury instruction regarding parole.

On direct appeal, the Texas Court of Criminal Appeals rejected Penry's challenge to the jury instruction, noting that Penry's offer of "waiver of parole" was not

legally binding. *Penry*, 903 S.W.2d at 763-64. The court rejected Penry's challenge to the prosecutor's argument as not properly preserved for review. *Id.* at 764.

A. The Prosecution's Argument

Penry procedurally defaulted on his claim that the prosecution's closing argument violated his rights. A procedural default in state court bars federal habeas review if the last state court rendering a judgment clearly and expressly rests its judgment on the procedural default. *Muniz*, 132 F.3d at 220; *Moore v. Roberts*, 83 F.3d 699, 702 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 772 (1997). The Fifth Circuit has held that the Texas contemporaneous objection rule is an independent and adequate state procedural bar. *Muniz*, 132 F.3d at 221; *Livingston v. Johnson*, 107 F.3d 297, 311-12 (5th Cir. 1997); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995). Penry does not argue that he meets the cause and prejudice or actual innocence exceptions to the procedural default rule. To the extent that Penry's *Simmons* claim rests on the trial court's failure to grant his motion for a mistrial based on the prosecutor's future dangerousness argument, he has procedurally defaulted that claim.

B. The Trial Court's Instructions

Penry's *Simmons* claim can also be read as a challenge to the trial court's failure to instruct the jury on the remoteness of Penry's chances for parole, based on Penry's signed "waiver." The Court of Criminal Appeals rejected Penry's *Simmons*

claim on the merits, holding that under Texas law "[t]he matter of parole or a defendant's release thereon is not a proper consideration for a jury's deliberations in the punishment phase of a capital murder trial." *Penry*, 903 S.W.2d at 764. The Texas court's conclusion is consistent with the Fifth Circuit decision in *Allridge*, and is neither contrary to, nor an unreasonable application of, clearly established federal law.

Penry argues that his case is distinguishable from *Allridge* because he offered, in a written, signed statement, to become "parole ineligible." Penry offers the affidavit of Dr. James W. Marquart, a professor of criminology at Sam Houston State University, opining that the Texas parole board would have given "great weight" to Penry's signed "waiver" in deciding whether to grant Penry parole in the future. (Docket Entry No. 19, Appendix, Ex. C, Affidavit of James W. Marquart, ¶ 4). Dr. Marquart recognized that Penry's signed statement was not a legally binding waiver of parole, but stated that "a parole board would have seen that document and given it great weight in determining whether Mr. Penry should be paroled," even if Penry "changed his mind and sought to 'take back' this statement." (*Id.*, ¶¶ 4, 7). In Dr. Marquart's opinion, the combination of the nature of Penry's crime and Penry's signed statement would have "forever erased [Penry's] chances of parole." (*Id.*, ¶ 8). Penry argues that in sentencing, the jury was entitled to consider that for all practical purposes, Penry would not receive parole.

It is undisputed that Penry's statement of waiver did not make him "legally ineligible" for parole. Dr. Marquart's affidavit speculates as to what the parole board might decide in the future. The Fifth Circuit cases clearly hold that *Simmons* is restricted to situations in which the defendant is presently ineligible for parole, as a matter of law. *See Boyd*, 1999 WL 71660, at *5; *Muniz*, 132 F.3d at 224; *Woods*, 75 F.3d at 1037; *Johnson v. Scott*, 68 F.3d 106, 111 (5th Cir. 1995); *Montoya*, 65 F.3d at 416; *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir. 1994). As the court stated in *Allridge*:

> A capital defendant's parole ineligibility . . . must be a matter of law because evidence of such ineligibility is inherently "truthful" and allows the defendant to deny or explain the state's case for future dangerousness. But if a defendant's ineligibility is a matter of fact, i.e., the defendant *probably* will not be eligible for parole, then the evidence is purely speculative (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness. The jury is left only to speculate about what a parole board may, or may not, do twenty or thirty years hence.

Allridge, 41 F.3d at 221-22 (citations omitted) (emphasis in original).

Penry argues that his case is different from *Allridge* because the prosecutor based his future dangerousness argument on Penry's danger to "free" society, improperly referencing a possibility of parole. The case law does not support Penry's proffered distinction. Even when the prosecution argues that a defendant will

be a future danger to "free" society, *Simmons* does not apply unless the defendant is legally ineligible for parole. *Id.* at 222. Penry's case does not violate *Simmons* simply because the prosecutor argued that Penry may be a future danger to "free" society.

This court must follow binding Fifth Circuit precedent. That precedent establishes that the Texas Court of Criminal Appeals' rejection of Penry's *Simmons* claim was not "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court." This court DENIES Penry's *Simmons* claim.[11]

VII. The *Estelle v. Smith* Claim (Claim V)

In *Estelle v. Smith*, 101 S. Ct. 1866 (1981), the Supreme Court held that the prosecution's use of a capital murder defendant's pretrial psychiatric examination in the sentencing phase as the basis for an examining psychiatrist's opinion as to the defendant's future dangerousness violated the Fifth and Sixth Amendments. The

[11] Penry requests an evidentiary hearing on his *Simmons* claim. Penry argues that he could offer evidence "regarding how often, if ever, a defendant tried for capital murder has been paroled -- at any point in his or her sentence." (Docket Entry No. 28, p. 39). Even if Penry presented such evidence, it would not distinguish his case from the *Allridge* line of cases. This court may not grant an evidentiary hearing on a claim which the petitioner has failed to develop in state court unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Penry's alleged constitutional error does not relate to his guilt. Moreover, even if Penry could prove the facts underlying the claim, he would not be entitled under *Allridge* to a reversal of his sentence. Penry's request for an evidentiary hearing to develop his *Simmons* claim is DENIED.

Supreme Court held that in the absence of proper *Miranda* warnings and an effective waiver from the defendant, the Fifth Amendment privilege against self-incrimination precluded the State from using statements the defendant made during the pretrial psychiatric examination to prove the defendant's future dangerousness. *Id.* at 1876.

In *Buchanan v. Kentucky*, 107 S. Ct. 2906 (1987), the Supreme Court clarified that its holding in *Estelle* did not apply if the defendant requested a pretrial psychiatric examination or if the defendant presented psychiatric evidence at trial. *Id.* at 2917-18. The Fifth Circuit has held that the first exception, that the defendant requests the examination, applies only if the defendant specifically requests an evaluation as to his future dangerousness. *See Vanderbilt v. Collins*, 994 F.2d 189, 196 (5th Cir. 1993); *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir. 1981).

In *Estelle v. Smith*, the Supreme Court also found that the State's failure to give defense counsel notice of the examination, including its scope and nature, violated the defendant's Sixth Amendment rights. *Estelle*, 101 S. Ct. at 1877. The State violates the Sixth Amendment if defense counsel is told that the defendant will be examined, but not that the examination will be used as evidence of the defendant's future dangerousness. *Vanderbilt*, 994 F.2d at 198. In *Powell v. Texas*, 109 S. Ct. 3146 (1989), the Court held that a defendant does not waive his Sixth Amendment right to counsel even if the defendant waives a Fifth Amendment challenge to the State's use

of statements he or she made in a pretrial psychiatric examination by requesting the examination or by introducing psychiatric evidence. *Id.* at 3150.

Penry argues that both his Fifth and Sixth Amendment rights were violated when the prosecution presented testimony from three psychiatrists and then used that testimony to argue that Penry would be dangerous in the future and that his mental status did not make the death sentence inappropriate.

A. The Psychiatric Testimony and the Prosecution's Argument

1. Dr. Fason's Testimony

During the guilt/innocence phase of Penry's second trial, Dr. Fason told the jury that he had conducted one three-minute interview with Penry and one twenty-minute interview. During both interviews, Penry communicated fully, identified his lawyer, and acted appropriately. (S.F. Vol. 46, pp. 786-88). Dr. Fason denied that he observed "any kind of a psychosis, or other type of mental illness" in Penry during the interviews. (*Id.*, p. 788). Dr. Fason discussed the accuracy of IQ tests and noted that a personality disorder, such as an antisocial personality, could affect a person's score on an IQ test. (*Id.*, pp. 788-92). Dr. Fason stated that he had reviewed "rather extensive" records "pertaining to Johnny Paul Penry's prior history" and records of neurological testing done on Penry. (*Id.*, pp. 794-95). Dr. Fason stated that he

disagreed with a report that concluded that Penry "may have a significant degree of brain damage." (*Id.*, p. 795).

The prosecutor then asked Dr. Fason for his opinion as to Penry's mental status in 1979, when the alleged rape and murder occurred. Dr. Fason concluded that "based on all of those records that [he] reviewed and [his] personal interviews with [Penry], the tests, [Dr. Fason's] training and experience and education," Penry "is on the borderline between mild mental retardation and dull normal." (*Id.*, p. 796). Dr. Fason also testified that Penry "has a personality disorder, an anti-social personality disorder." (*Id.*). Dr. Fason admitted that a person with an antisocial personality disorder could also be referred to as a "psycho-path." (*Id.*). Dr. Fason described an antisocial personality as "a person that has repeated difficulties with authority. They tend to be very selfish, callous and self-centered." (*Id.*, p. 798). Dr. Fason testified that he did not know of a cure for an antisocial personality. (*Id.*, p. 800). Dr. Fason then again explained that an antisocial personality disorder could lower a person's score on an IQ test.

The prosecutor asked Dr. Fason whether Penry "is the type of person that looks up to an authority figure." (*Id.*, p. 804). Dr. Fason testified that he believed Penry does not respect authority and would not be "led easily by other people" because of his antisocial personality. (*Id.*, pp. 804-05). Dr. Fason also testified that he

believed Penry had the capacity to act intentionally and possessed the intellectual capability to understand *Miranda* warnings and waive those warnings knowingly and intelligently. (*Id.*, pp. 811-13).

Although Dr. Fason did not specifically testify as to Penry's future dangerousness, the prosecutor referred to Dr. Fason's testimony during the sentencing phase of the trial in arguing Penry's future dangerousness. (S.F. Vol. 51, pp. 1933-34).

2. Dr. Quijano's Testimony

During the sentencing phase, Dr. Quijano testified that although Penry's IQ test scores placed him in the "mildly mentally retarded" to "borderline" range of intelligence, Penry's "adaptive skills" were sufficient to classify him as "not mentally retarded." (S.F. Vol 50, pp. 1629, 1648). Dr. Quijano also testified that he believed Penry had the ability to control his actions. After Dr. Quijano denied that Penry was retarded or had organic brain damage, Dr. Quijano testified that Penry suffered from an antisocial personality disorder. (*Id.*, pp. 1648-49). As evidence of Penry's antisocial personality, Dr. Quijano noted

> repeated violations of the law, disregard of the rights of others, the inability to learn from previous experience in the sense that one does not profit from the punishment or from being caught. There is an element of cold bloodiness [sic] without it, the person does not experience remorse . . . .

(*Id.*, p. 1651). Dr. Quijano also testified that persons with an antisocial personality and a history of violence could be classified as dangerous and that there is no cure for an antisocial personality. (*Id.*, p. 1652). Dr. Quijano testified that he believed Penry "is more likely to engage in continuing acts of violence in the future." (*Id.*, p. 1654).

3. Dr. Samenow's Testimony and Dr. Peebles' Report

Dr. Samenow testified during the sentencing phase that he believed Penry to have an "anti-social personality." (*Id.*, p. 1731). Dr. Samenow agreed that Penry was aggressive, violent, manipulative, dangerous, and unremorseful. (*Id.*, pp. 1734-36). When asked if he believed Penry was likely to change, Dr. Samenow testified that "the prognosis would be pretty bleak." (*Id.*, p. 1736).

In his testimony during the sentencing phase of Penry's 1990 trial, Dr. Samenow made only one reference to a report from Dr. Peebles, who had examined Penry before his 1977 conviction for aggravated rape. Penry's counsel had requested that Dr. Peebles examine Penry. (S.F. Vol. 47, p. 1058). Dr. Samenow noted that Dr. Peebles' report reflected that Penry "on occasion, heard voices and saw things, but . . . he probably learned this at Rusk State Hospital and is using this as an excuse to cover up his offenses." (S.F. Vol. 50, p. 1729). Dr. Samenow then testified that "TDC Medical Records" showed that Penry had on occasion used his mental retardation as an excuse for violent or destructive behavior. (*Id.*, pp. 1730-31). Dr. Samenow

testified that he had developed his diagnosis of Penry's antisocial personality from a review of "records" showing that Penry had a history of committing "anti-social acts" and a "broad range of criminal activity." (*Id.*, pp. 1731-32). Dr. Samenow testified that he based his conclusion that Penry's crimes were planned or premeditated from these same "records" and from Penry's "prior criminal and violent behavior." (*Id.*, pp. 1733-34). Dr. Samenow broadly referred to the "TDC Medical Records" as supporting his opinion that Penry could exercise self-control; could act deliberately; was aggressive, violent, and manipulative; was capable of acting voluntarily; and was dangerous and unlikely to change. (*Id.*, pp. 1734-37).[12]

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[12] Dr. Samenow's description of the records he reviewed in preparing to testify shows that Dr. Peebles' report was one of many documents that Dr. Samenow consulted. Dr. Samenow testified that he reviewed

> [t]he confession of the Defendant that was dated 1979, I believe, two of them. Information concerning 1977 rape conviction involving a Diana Koch. The Defendant's records from Austin State Hospital, University of Texas Medical Branch at Galveston, TDC Medical and Mental Health Records, Mental Health or records from the Polk County Mental Health and Mental Retardation Unit, records from the Mexia State School, records from the Texas Rehabilitation Commission, the Rusk State Hospital, the Goose Creek Independent School District, Competency and Insanity Examination by Dr. Kenneth A. Vogtsberger, TDC Disciplinary Records on this Defendant, both for his current incarceration and prior incarceration, I believe a Competency Trial Transcript . . . .

(S.F. Vol. 50, pp. 1715-16).

4. The Prosecutor's Use of Dr. Peebles' Report in Closing Argument

In closing argument, the prosecutor used Dr. Peebles' report to argue Penry's future dangerousness:

> In 1977, this man raped Diana Rearden. A few months later he was examined by Dr. Felix Pebbles [sic], who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but, Dr. Pebbles [sic], went on and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons.

(S.F. Vol. 51, pp. 1946-47).

B. The Findings and Conclusions of the State Court

On Penry's direct appeal, the Texas Court of Criminal Appeals thoroughly discussed Penry's *Estelle v. Smith* claim and, applying the Supreme Court rulings in *Estelle* and *Buchanan*, rejected the claim. *Penry*, 903 S.W.2d at 757-60. As to the Sixth Amendment claim, the Texas court found that Penry's attorney was "on notice that if he intended to put on a 'mental status' defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Id.* at 758-59. The court also found that Penry was not examined for future dangerousness. Based on these findings, the Texas court concluded that there had been no Sixth Amendment violation.

As to Penry's Fifth Amendment claim, the Texas Court of Criminal Appeals found that the testimony of Dr. Fason, who did not testify regarding future dangerousness, was proper rebuttal testimony under *Buchanan*. The state court noted that Dr. Quijano had testified as to Penry's future dangerousness but did not base his opinion on his examination of Penry. *Id.* at 759. As to Dr. Peebles' 1977 examination, the state court found that defense counsel had requested that examination and that during the 1990 trial, no expert witness referred to any testimonial statements contained in the Peebles report. *Id.* The state appellate court specifically found that Dr. Samenow and Dr. Quijano did not base their opinions regarding future dangerousness on Dr. Peebles' examination and report. *Id.* Based on these facts, the Texas court concluded that *Estelle* did not apply to Penry's trial and did not support his claim for relief. *Id.* The Texas court determined that Penry's claim regarding the prosecutor's closing argument was procedurally barred. *Id.* at 760.

This court finds that Penry has failed to rebut, by the necessary clear and convincing evidence, the presumption that the state court's factual findings are correct, as the AEDPA requires. The legal conclusions of the Texas Court of Criminal Appeals are neither contrary to, nor an unreasonable application of, clearly established federal law, and they are not based on an unreasonable determination of the facts in light of the

evidence presented. This court DENIES Penry's request for federal habeas relief on his *Estelle v. Smith* claim.

C. Harmless Error Analysis

Even if this court rejected the Texas Court of Criminal Appeals' findings and concluded that Dr. Fason's testimony violated *Estelle v. Smith* to the extent that it went beyond rebutting the testimony Penry offered by providing an opinion as to future dangerousness, the error was harmless under *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993).

Under *Brecht*, a trial error of constitutional magnitude does not entitle a defendant to habeas relief unless the error "'had a substantial or injurious effect or influence in determining the jury's verdict.'" *Id.* at 1722 (quoting *Kotteakos v. United States*, 66 S. Ct. 1239, 1253 (1946)); *see also Harris v. Warden, Louisiana State Penitentiary*, 152 F.3d 430, 437 (5th Cir. 1998); *Woods v. Johnson*, 75 F.3d at 1017, 1026-33 (5th Cir. 1996) (applying the *Brecht* standard to reject a petitioner's *Estelle* claim). In *Woods*, the Fifth Circuit found the prosecution's violation of *Estelle* to be harmless because the psychiatrist's testimony as to future dangerousness was "equivocating and weak"; the jury could not reasonably construe the psychiatrist's testimony as based on his examination of the defendant; and the prosecution primarily relied on other evidence of the defendant's future dangerousness. *Woods*, 75 F.3d at

1027, 1028-33. The *Woods* court found the psychiatrist's testimony to be "equivocating and weak" for two reasons. The psychiatrist admitted that behavioral scientists' efforts to predict future behavior were not very accurate. He also testified only that someone who had committed violent acts in the past was "more likely" to commit future violent acts. *Id.* at 1027.

Dr. Fason's direct testimony on Penry's future dangerousness was highly "equivocating and weak," so much so that it is debatable whether he even testified as to future dangerousness. Additionally, on cross-examination, Dr. Fason substantially limited the potential impact of his direct testimony. After Penry's counsel asked Dr. Fason if he would need longer than a twenty-minute examination to make a diagnosis of an antisocial personality, Dr. Fason answered that, although he would not need additional time to make a "diagnosis," he would need significantly more time to make a prognosis as to the future and, indeed, could not make such a prognosis as a scientific opinion. (S.F. Vol. 46, p. 821). This testimony is similar to the psychiatrist's testimony in *Woods*, disclaiming an ability to predict the defendant's future dangerousness beyond a statement that someone with a past history of violent acts has a greater likelihood of committing future violence than a person with no prior violent conduct.

Dr. Fason's testimony on direct examination was less inflammatory than testimony presented in cases finding harmful error. *See Satterwhite v. Texas*, 108 S. Ct. 1792, 1799 (1988) (the psychologist testified that the defendant unequivocally "will present a continuing threat to society by continuing acts of violence," was "as severe a sociopath as you can be," and was "beyond the reach of psychiatric rehabilitation"); *Estelle*, 101 S. Ct. at 1871 (the psychologist testified that the defendant was a "very severe sociopath" who would "continue his previous behavior," whose sociopathic condition would "only get worse," and who would "go ahead and commit other similar or same criminal acts if given the opportunity to do so").

In addition, the record reflects that Dr. Fason's diagnosis drew primarily from sources other than his examination of Penry. Although Dr. Fason included the examination in his diagnosis, he disagreed that the diagnosis was made "on the basis of" the interview. (S.F. Vol. 46, p. 820). Dr. Fason had also reviewed Penry's "rather extensive" medical records in reaching his conclusions. Dr. Fason testified on redirect examination that his diagnosis of Penry's antisocial personality was his "impression, diagnostic impression, and that is based on review of all of the records." (*Id.*, p. 829). *See Woods*, 75 F.3d at 1028-30 (the psychiatrist's limited opinion concerning the defendant's future dangerousness was based primarily on a hypothetical given by the prosecutor); *Savino v. Murray*, 82 F.3d 593, 605-06 (4th Cir. 1996) (finding harmless

error when the expert "said he reviewed numerous outside materials" in diagnosing the defendant).

Finally, Dr. Fason's testimony was a very small part of the prosecution's evidence of Penry's future dangerousness. Two other experts, Drs. Quijano and Samenow, testified far more extensively and unequivocally than Dr. Fason that Penry would be a future danger. Dr. Quijano testified during the sentencing phase that Penry was "likely to engage in continuing acts of violence in the future." (S.F. Vol. 50, p. 1654). Dr. Samenow testified that the possibility that Penry's antisocial behavior would change "would be pretty bleak." (*Id.*, p. 1736). The prosecution also presented testimony during the sentencing phase from five prison guards and a deputy sheriff that Penry had committed violent and aggressive acts while in custody and had a reputation for being dangerous. Four of the prison guards specifically testified that they believed Penry would be a future danger. (S.F. Vol. 47, pp. 970, 983, 1008-09, 1157-60). The prosecution also presented Penry's 1977 aggravated rape conviction and testimony from the victim, as well as testimony from the woman Penry identified in his confession as someone he wanted to rape.

In his closing argument, the prosecutor relied far more heavily on evidence of Penry's dangerousness other than Dr. Fason's testimony. The prosecutor made only a brief reference to Dr. Fason's testimony to support his argument as to Penry's future

dangerousness. *See Woods*, 75 F.3d at 1032 (noting that the objectionable references to the psychiatrist's testimony constituted less than ten percent of the prosecutor's closing argument).

The aggravated nature of Penry's crime, the inculpatory and remorseless statements in his confessions, and Penry's other violent acts, all supported the prosecution's future dangerousness argument. In *Woods*, the court found that admission of the psychiatrist's testimony was harmless error, in part because "[t]he real strength of the prosecution case on future dangerousness was the nature of the crime itself . . . coupled with the [previous] conviction and fifteen-year sentence for attempted aggravated rape." *Id.*; *see also Savino*, 82 F.3d at 605 ("At sentencing, the Commonwealth presented compelling evidence of Savino's prior criminal record and his own statements of his criminal history. The nature of the crime and the circumstances surrounding it certainly revealed viciousness and dangerousness.").

This court concludes that the admission of any testimony by Dr. Fason that could be characterized as evidence of Penry's future dangerousness did not have a "substantial and injurious effect" on the jury's verdict. Even if this court were to determine that Dr. Fason's testimony violated the Supreme Court's decision in *Estelle v. Smith*, the court would conclude that the error was harmless. The court DENIES Penry's *Estelle* claim.

VIII. The Exclusion of Evidence of Shirley Penry's Mental Illness (Claim VI)

During the sentencing phase of his retrial, Penry offered two hospital records documenting post-partum psychotic, schizophrenic behavior by Shirley Penry, Penry's mother. The trial court excluded the documents. (S.F. Vol. 49, pp. 1561-65). Penry argues that the trial court's exclusion of the evidence violated his constitutional rights by preventing the jury from hearing and considering relevant mitigating evidence.

The Court of Criminal Appeals upheld the trial court's exclusion of the evidence as irrelevant, finding that "the records did not discuss whether [Penry's] mother abused any of her children, or even whether her mental condition made it likely that she would abuse her children. There was no evidence that her psychological problems would have led to child abuse." *Penry*, 903 S.W.2d at 762. The determination by the state appellate court that the evidence was irrelevant is not an unreasonable application of clearly established federal law and cannot provide a basis for granting Penry federal habeas relief under the AEDPA.

A state trial court's ruling that the proffered testimony is inadmissible is entitled to deference by a federal habeas court. *See Panzavecchia v. Wainwright*, 658 F.2d 337, 340 (5th Cir. 1981) ("[F]ederal courts are compelled to defer to a state court's interpretation of its own criminal laws, rules of evidence and rules of criminal procedure." (citing *Spencer v. Texas*, 87 S. Ct. 648 (1967))); *see also Little v. Johnson*,

APPENDIX C

DECISION OF THE UNITED STATES COURT OF APPEALS DENYING MOTIONS FOR PANEL REHEARING AND REHEARING *EN BANC*

PWRW & G

JUL 27 2000

☑ DOCKETED
☑ IMAGED

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

U.S. COURT OF APPEALS
FILED
JUL 25 2000
CHARLES R. FULBRUGE III
CLERK
Iss'd 7/26 MRW

No. 99-20868

U.S. COURT OF APPEALS
RECEIVED
JUL 25 2000
NEW ORLEANS, LA

JOHNNY PAUL PENRY

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

On Petition for Rehearing

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

In his petition for rehearing, Penry contends for the first time that Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), controls the admissibility of the Peebles report. Battie was decided before Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906 (1987), and we explained in Schneider v. Lynaugh, 835 F.2d 570 (5th Cir. 1988), how Buchanan controls this issue when an accused requests an examination, particularly when he puts his mental status at issue. In Schneider, we stated that:

> Schneider requested the competency examination. Before Buchanan, we held that this fact "[did] not obviate the necessity for giving the Miranda warnings" when the examination extended beyond the subject of competency. (Battie, 655 F.2d at 702-3). The Court in Buchanan, however, regarded such a request as militating against the defendant's assertion of the privilege, for it stated that "if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested."

835 F.2d at 577.

Because Schneider, rather than Battie, controls our decision on this issue, we DENY Penry's petition for panel rehearing.

Judge Dennis would GRANT the motion for panel rehearing.

No judge in regular, active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

W. Eugene Davis
United States Circuit Judge

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APPENDIX D

DECISION OF THE UNITED STATES DISTRICT COURT

DENYING MOTION TO ALTER AND AMEND JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AUG 13 1999

Michael N. Milby, Clerk of Court

JOHNNY PAUL PENRY,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. H-97-4094
	§	
GARY L. JOHNSON,	§	
Director, Texas Department of	§	
Criminal Justice, Institutional Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND OPINION

In a March 29, 1999 Memorandum and Order, this court analyzed the petition for writ of habeas corpus filed by petitioner, Johnny Paul Penry, and granted summary judgment in favor of respondent, Gary L. Johnson, Director of the Texas Department of Criminal Justice—Institutional Division, on each of Penry's claims. (Docket Entry No. 33). Following a detailed review of Penry's arguments, this court determined that Penry was not entitled to a Certificate of Appealability ("COA").

Penry has filed a motion to alter and amend the judgment and a brief in support. (Docket Entry Nos. 36, 37). Based on the motion, the brief, this court's March 29, 1999 Memorandum and Order, and the applicable law, this court DENIES Penry's motion to alter and amend the judgment. The reasons are stated below.

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I. The Motion to Alter and Amend the Judgment

Penry raises two grounds: (1) this court applied an impermissibly restrictive standard in denying Penry a COA; and (2) this court erred in its legal analysis of Penry's "mitigation instruction" claim.

A. The Legal Standard for Granting a COA

The law is clear that a COA issues if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). "A petitioner can meet this burden by demonstrating that 'the issues [presented] are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.'" *Little v. Johnson*, 162 F.3d 855, 859 (5th Cir. 1998) (alteration in original) (quoting *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394-95 & n.4 (1983)), *cert. denied*, 119 S. Ct. 1768 (1999). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.'" *Id.* (quoting *Barefoot*, 103 S. Ct. at 3394-95).

Penry's disagreement is not with this court's statement of the legal standard for granting a COA, but rather the application of that standard. In its prior

Memorandum and Order, this court found that "Penry has failed to make a 'substantial showing of the denial of a constitutional right'" "because . . . each of his claims is foreclosed by clear, binding precedent, often recently decided." (Docket Entry No. 33, p. 156). Penry asserts that the merits of some of his claims are "debatable among jurists of reason" because support for these claims has come from "Judges and Justices from the Supreme Court, Fifth Circuit, and the Texas Court of Criminal Appeals," although the support is found only in concurring and dissenting opinions. (Docket Entry No. 37, p. 4).[1] Penry argues that "[t]o deny [him] a certificate of appealability is implicitly to call into question the reasonableness of some of the country's greatest legal minds." (*Id.*).

Penry's approach to the legal standard for the issuance of COAs overstates the basis, and understates the purpose, of a COA. Courts deny COAs on issues that have sparked vigorous disagreement among judges, but have been decided, even without consensus among all "jurists of reason."

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[1] Penry identifies the following jurists as those supporting his "most important claims": *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J.; Souter, J.; Ginsburg, J.; Breyer, J.) (respecting the denial of the petition for writ of certiorari); *Whitaker v. State*, 977 S.W.2d 595, 601-02 (Tex. Crim. App. 1998) (Price, J., concurring), *cert. denied*, 119 S. Ct. 878 (1999); *May v. Collins*, 904 F.2d 228, 232-33 (5th Cir. 1990) (Reaveley, J. and King, J., concurring). (Docket Entry No. 37, p. 4).

In *Little v. Johnson*, the petitioner requested a Certificate of Probable Cause ("CPC")[2] on a due process claim based on the admission of psychiatric testimony on the potential for future dangerousness in the sentencing phase of his capital trial. The testimony was based on a hypothetical set of facts. *See* 162 F.3d at 862-63. The Fifth Circuit declined to issue the CPC, despite the fact that three Supreme Court justices--Justices Blackmun, Brennan, and Marshall--had previously found that such psychiatric testimony was constitutionally defective. *See Barefoot*, 103 S. Ct. at 3406-18 (Blackmun, J., dissenting).

In *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999), *petition for cert. filed*, -- U.S.L.W. -- (U.S. June 17, 1999) (No. 98-9936), the petitioner requested a COA on his claim that his state habeas proceedings violated his due process rights. The Fifth Circuit did not grant the petitioner the COA, because "[o]ur circuit precedent makes clear that [petitioner's] 'claim fails because infirmities in state habeas proceedings do not constitute grounds for relief in federal court.'" *Id.* at 180 (quoting *Hallmark v. Johnson*, 118 F.3d 1073, 1080 (5th Cir.), *cert. denied sub*

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[2] In Section 102 of the AEDPA, Congress amended 28 U.S.C. § 2253 to provide that a COA, rather than a CPC, is the appropriate mechanism for allowing a habeas petitioner to appeal a final judgment from a federal district court. "The standard for obtaining a COA is the same as for a CPC." *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997). However, "a COA, unlike a CPC, must 'indicate which specific issue or issues satisfy the showing required . . . .'" *Murphy*, 110 F.3d at 11 n.1 (quoting 28 U.S.C. § 2253(c)(3)).

nom. Johnson v. Monroe, 118 S. Ct. 576 (1997)). The Fifth Circuit observed that five of the six circuits that had considered the issue had arrived at the same conclusion. *See id.* The fact that a United States court of appeals had disagreed did not prevent the Fifth Circuit from denying the petitioner a COA.

In *Castillo v. Johnson*, 141 F.3d 218 (5th Cir.), *cert. denied*, 119 S. Ct. 28 (1998), the petitioner claimed that his federal constitutional rights were violated by the state trial court's exclusion of polygraph evidence, a decision based on a state law *per se* bar on such evidence. Citing *United States v. Sheffer*, 118 S. Ct. 1261 (1998), the Fifth Circuit found that a *per se* rule against the admission of polygraph evidence did not violate the Fifth or Sixth Amendment rights of the accused to present a defense. *See id.* at 222. The Fifth Circuit declined to issue the petitioner a CPC, notwithstanding the fact that Justice Stevens dissented from the Supreme Court's opinion approving a *per se* bar on polygraph evidence. *See Sheffer*, 118 S. Ct. at 1270-79 (Stevens, J., dissenting).

In *Barber v. Johnson*, 145 F.3d 234 (5th Cir.), *cert. denied*, 119 S. Ct. 518 (1998), the petitioner had been convicted of capital murder and sentenced to death. The petitioner petitioned for state habeas relief, asserting error in the admission of certain psychiatric testimony. The Texas Court of Criminal Appeals denied that relief because it found any error to be harmless. *See Barber v. State*, 757

S.W.2d 359 (Tex. Crim. App. 1988). The petitioner unsuccessfully sought habeas relief in federal district court. In his appeal to the Fifth Circuit, the petitioner complained that the Texas Court of Criminal Appeals and the district court mistakenly applied the harmless error standard articulated in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), rather than the standard set out in *Chapman v. California*, 87 S. Ct. 824 (1967). Noting that a prior panel, *Hogue v. Johnson*, 131 F.3d 466 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1297 (1998), had already decided the issue, the Fifth Circuit denied the petitioner's request for a CPC, even though the "holding in *Hogue* may be viewed as inconsistent with the Supreme Court's underlying reasoning for applying the *Brecht* standard in federal habeas review." *Barber*, 145 F.3d at 236. The *Barber* court disagreed with the holding of a prior Fifth Circuit panel, yet declined to issue a CPC because the prior panel's decision was binding. *See id.* at 237.

In *Boyd v. Johnson*, 167 F.3d 907 (5th Cir. 1999), *cert. denied*, -- S. Ct. --, 1999 WL 412897 (U.S. Aug. 5, 1999), the Fifth Circuit considered the petitioner's request for a CPC on his *Simmons* claim.[3] Penry asserted a similar cla in this case

[3] In *Simmons v. South Carolina*, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that when a capital murder defendant would be ineligible for parole under state law if sentenced to life imprisonment, and the prosecution argues that the defendant would be dangerous in the future, due process requires the jury to be informed that the defendant would be ineligible for parole. The Fifth Circuit has rejected the extension of the *Simmons* rule to a Texas capital defendant. *See*

and now argues that it is especially worthy of a COA. The Fifth Circuit denied the request for a CPC in *Boyd*. In *Boyd*, as in this case, petitioner asserted that the trial court erred by permitting the prosecutor to argue future dangerousness while denying petitioners the opportunity to present evidence and argue that if the jury imposed a sentence, parole would not be likely. In *Boyd*, as in this case, petitioner relied on a dissent from the denial of *certiorari* in *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J., dissenting from the denial of the petition for a writ of *certiorari*). Four justices joined in the dissent. In the dissenting opinion, Justice Stevens noted the "obvious tension" between *Simmons* and the refusal by the State of Texas to allow a defendant to give the jury truthful information about his parole eligibility, observing that this tension made the Texas capital punishment scheme "especially troubling." *See id.* at 355-56. The *Boyd* court declined to grant a CPC on the *Simmons* claim, despite the dissent by four members of the Supreme Court from the denial of petition for a writ of *certiorari* in *Brown*. *See* 167 F.3d at 912-13.

Penry's argument would appear to require that a COA issue in every appeal from a denial of habeas in a capital case. There have been, and are, individuals and jurists of reason who find capital punishment unconstitutional in any

Allridge v. Scott, 41 F.3d 213, 222 (5th Cir. 1994). Under Texas law, a capital defendant is not legally ineligible for parole. The Fifth Circuit held that *Simmons* applies only to situations in which the defendant is "legally ineligible" for parole. *Id.* at 222.

case, as a violation of basic moral standards of decency. Penry echoed this argument in his habeas petition, particularly as applied to the execution of those with the impairments Penry presents. However, it is clear that the disagreement by jurists of reason over the constitutionality of capital punishment does not require a COA in every capital case.

COAs should be granted on an issue presented in the habeas petition that is not settled. *See Drinkard v. Johnson*, 97 F.3d 751, 756 n.6, 770 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled on other grounds by Lindh v. Murphy*, 117 S. Ct. 2059 (1997).[4] However, habeas petitioners cannot obtain a COA by finding support for their claims in concurring or dissenting opinions, in the face of binding majority decisions adverse to their claims.

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[4] There is some authority suggesting that a significant circuit split might also warrant the issuance of a COA, even when there is binding authority in the circuit of the court considering the COA request.

In *Lozada v. Deeds*, 111 S. Ct. 860 (1991) (per curiam), a Nevada District Court and the Ninth Circuit denied the petitioner's request for a CPC. *See* 111 S. Ct. at 861. The Supreme Court found that the Ninth Circuit erred in denying the petitioner a CPC, because at least two circuit courts had resolved the habeas claim at issue in a different manner. *See id.*

In *Lynce v. Mathis*, 117 S. Ct. 891 (1997), the petitioner's request for a CPC on his *ex post facto* claim had been denied by a Florida district court based on clear Florida and Eleventh Circuit precedent. *See* 117 S. Ct. at 893. The Eleventh Circuit also denied the petitioner a CPC in an unpublished order. Noting that the Tenth Circuit had "reached a different conclusion on similar facts," the Supreme Court granted certiorari and reversed the Eleventh Circuit. *See id.*

This court does not reach the issue of whether this situation requires the issuance of a COA. None of Penry's claims is supported by a binding majority decision of any circuit court.

Penry's claims are foreclosed by clear, binding Fifth Circuit precedent. His claims have not attracted the support of a majority in any other circuit. Penry is not entitled to a COA as to such issues.

B. The Mitigation Instruction Claim

In Penry's federal habeas challenge to his first trial and conviction, the Supreme Court granted relief after finding that none of the three special issues set out in article 37.071(b) of the Texas Code of Criminal Procedure provided a means for the jury to give effect to Penry's mitigating evidence. *See Penry v. Lynaugh*, 109 S. Ct. 2934, 2949 (1989) ("*Penry I*"). During the sentencing phase of Penry's retrial, the jury was again asked to answer the same special issues.[5] In the retrial, however,

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[5] The special issues that the jury was asked to answer included:

Special Issue No. 1
Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2
Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 3
Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Trans. Vol. 5, pp. 1330-31).

the trial judge provided the jury with an instruction on how to incorporate Penry's mitigating evidence into its sentencing decision. In this habeas challenge, Penry claims that this instruction was insufficient to cure the constitutional deficiencies identified by the Supreme Court in *Penry I*.

This court analyzed the jury instruction, Penry's presentation of extensive mitigating evidence, and defense counsel's jury arguments. In *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 119 S. Ct. 418 (1998), the Fifth Circuit had approved an instruction similar to the one at issue in Penry's retrial.[6] This court held that in the sentencing phase of Penry's second trial, the jury was able to

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[6] In *Emery*, the jury was instructed as follows:

> [Y]our answers to the Special Issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal moral culpability of the defendant in this case.
> When you deliberate about the questions posed in the Special Issues, you are to consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the defendant's background, character, and record, or circumstances of the crime, which you believe makes a sentence of death inappropriate in this case. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the special issues. If you determine, in consideration of this evidence, that a life sentence, rather than a death sentence, is an appropriate response to the personal moral culpability of the defendant, you are instructed to answer the Special Issue under consideration "No".

Emery, 139 F.3d at 200.

give "constitutionally sufficient consideration to Penry's mitigating evidence." (Docket Entry No. 33, p. 24).

Penry now asks this court to reconsider its ruling. Penry asserts that jury instruction given in his retrial was defective in that it did not place his mitigating evidence within the effective reach of the jury; that the defects in the jury instruction were not present in the instruction at issue in *Emery*; and that these defects could not be cured by arguments of counsel or by the presentation of mitigating evidence.

In Penry's retrial, the trial court gave the following instruction to the jury:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which

> you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329).

Penry asserts that this instruction has two flaws not present in the jury instruction given in *Emery*.[7] First, Penry's jury was instructed to give a negative finding to one of the special issues only if the jury determined that a "life sentence . . . , rather than a death sentence, is an appropriate response to the *personal culpability* of the defendant." (*Id.* (emphasis added)). The *Emery* instruction, by contrast, asked the jury to consider the "personal *moral* culpability" of the defendant. Penry asserts that the phrase "personal culpability of the defendant," without the word "moral," might lead the jurors to believe that they could "only consider whether

[7] To the extent that Penry's claim rests on a challenge to the constitutionality of a "nullification instruction," rather than on the differences between his instruction and the one given in *Emery*, this claim is foreclosed by *Emery*. *See Emery*, 139 F.3d at 199-200; *Gribble v. Johnson*, 8 F. Supp. 2d 942, 956-57 (S.D. Tex. 1998); *see also Wheatfall v. State*, 882 S.W.2d 829, 841 (Tex. Crim. App. 1994); *Coble v. State*, 871 S.W.2d 192, 206 (Tex. Crim. App. 1993) (en banc); *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992).

Penry is 'personally' culpable, or responsible, for the crime itself– not whether there is anything in the 'defendant's background, character, or other circumstances that reflect a reduced *moral* capability.'" (Docket Entry No. 37, p. 17 (quoting *Boyd v. Johnson*, 167 F.3d 907, 911 (5th Cir. 1999))).

The Supreme Court in *Penry I* approved the use of the term "personal culpability" with reference to mitigating evidence. The Court noted that a jury must be able to consider and give effect to mitigating evidence "because the punishment should be directly related to the *personal culpability* of the defendant." *Penry I*, 109 S. Ct. at 2951 (emphasis added). In addition, in the following passage, the Court used the concepts of personal culpability and moral culpability interchangeably:

> *Personal culpability* is not solely a function of a defendant's capacity to act "deliberately." A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was *less morally "culpable* than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.

Penry I, 109 S. Ct. at 2949 (emphasis added) (citing *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O. Connor, J., concurring)). The absence of the word "moral" in Penry's instruction does not make the instruction constitutionally defective.

Penry also challenges the last sentence of the jury charge as constitutionally defective. The judge instructed the jury that: "[i]f you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration,* rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." (Trans. Vol. 5, p. 1329) (emphasis added). Penry argues that the phrase, "as reflected by a negative finding to the issue under consideration," a phrase not found in the *Emery* jury charge, "brings the Penry violation around full-circle to what it was in Penry I. If, according to the court's instruction, a life sentence is only appropriate if there is a 'negative finding to the issue under consideration,' then Penry might as well not have had a Penry instruction, because the instruction only allows the jury to grant a life sentence if the honest answer to one of the three special questions is 'no.'" (Docket Entry No. 37, pp. 17-18).

The Supreme Court has admonished that courts are "not [to] engage in a technical parsing of this language of the instructions, but instead approach the

instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993) (quoting *Boyde v. California*, 110 S. Ct. 1190, 1198 (1990)). The standard for determining whether instructions adequately permit a jury to consider and give effect to mitigating evidence is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Buchanan v. Angelone*, 118 S. Ct. 757, 761 (1998) (quoting *Boyde*, 110 S. Ct. at 1198). Penry need not prove that "it was more likely than not that the jury was prevented from giving effect to the [mitigating] evidence, [but] the standard requires more than a mere possibility of such a bar." *Johnson v. Texas*, 113 S. Ct. at 2669.

Before reaching the disputed sentence, the trial court informed the jury that:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that *your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of*

your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

You are instructed that *when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case.* If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, *give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue.*

(Trans. Vol. 5, p. 1329) (emphasis added). Examining the charge in its entirety, the last sentence told the jury how to effectuate a life sentence, if that was the punishment the jury deemed appropriate in light of Penry's mitigating evidence. The charge as a whole removes the confusion resulting from viewing the challenged phrase in isolation.

"Even were [this court] to entertain some doubt as to the clarity of the instructions, [this court held that] the entire context in which the instructions were given expressly informed the jury that it could consider mitigating evidence." *Buchanan*, 118 S. Ct. at 762. This court analyzed Penry's counsel's closing arguments in the sentencing phase of the trial, as well as the presentation of Penry's

extensive mitigating evidence in both the guilt and sentencing phases of the trial. Penry now asserts that this court erred in considering these factors.

The Supreme Court has held that constitutionality of jury instructions depends upon "the entire context in which the instructions were given." *Buchanan*, 118 S. Ct. at 762; *see also Boyde*, 110 S. Ct. at 1199-1200. As Penry concedes, (Docket Entry No. 37, p. 11), and as both the Supreme Court and Fifth Circuit have held, jury arguments explaining how mitigating evidence can or should be considered in sentencing are part of this "context" and can affect whether the jury likely applied the instructions so as to present consideration of relevant mitigating evidence. *See Buchanan*, 118 S. Ct. at 762-63; *Drinkard*, 97 F.3d at 761 n.16 ("The arguments of counsel are relevant to a jury's interpretation of challenged jury instructions, but the court's instructions carry substantially more weight."). Penry correctly observes that the arguments of counsel cannot cure an otherwise unconstitutional jury charge. However, as explained above, that situation was not present here. In this case, the jury received constitutional jury instructions that were further clarified by the arguments of Penry's counsel. This court properly considered these jury arguments in examining the "entire context in which the instructions were given."

Penry also argues that this court erred in stating that Penry's presentation of extensive mitigating evidence would likely convey to the jury that they may take

the evidence into account in sentencing. Three times in the last decade, the Supreme Court has held that the defendant's presentation of mitigating evidence is relevant to determining how a jury would understand a given instruction. *See Buchanan*, 118 S. Ct. at 762-63 ("[T]here were two days of testimony relating to petitioner's family background and mental and emotional problems. It is not likely that the jury would disregard this extensive testimony in making its decision, particularly given the instruction to consider 'all the evidence.'"); *Johnson v. Texas*, 113 S. Ct. at 2669 ("It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue."); *Boyde*, 110 S. Ct. at 1199-1200 ("All of the defense evidence presented at the penalty phase–four days of testimony consuming over 400 pages of trial transcript–related to petitioner's background and character, and we think it unlikely that reasonable jurors would believe that the court's instructions transformed all of this favorable testimony into a virtual charade.") (internal quotation omitted).[8]

This court recognizes that the presentation of mitigating evidence alone cannot cure a *Penry* error. Under that approach, Penry would not have been entitled

[8] The position Penry takes in this case has been presented only in a dissenting opinion. *See Buchanan*, 118 S. Ct. at 766 (Breyer, J., dissenting) ("[T]he presentation of evidence does not tell the jury that the evidence presented can be taken into account–particularly in the context of an instruction that seems to exclude the evidence from the universe of relevant considerations.").

to habeas relief in his first habeas challenge. As the *Boyde* Court explained: "[p]resentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence. But the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 110 S. Ct. at 1200.

Penry attempts to distinguish *Buchanan*, *Johnson*, and *Boyde* by pointing to a passage in *Johnson*, in which the Court distinguished *Penry I*. The *Johnson* Court observed that in that case, the petitioner's mitigating evidence was relevant to the second special issue, while in *Penry I*, Penry's mitigating evidence could not be given effect under the special issues. *See* 113 S. Ct. at 2669-70. This distinction applied to Penry's first trial, not his second. During Penry's retrial, the jury instructions brought Penry's mitigating evidence within the effective reach of the jury. The Supreme Court has expressly instructed courts to consider the nature and extent of the mitigating evidence presented in "deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 110 S. Ct. at 1200.[9]

[9] This court recognizes that the approach is inherently somewhat circular. While courts are to consider the overall context in which jury instructions are given (including the jury arguments and the presentation of mitigating evidence) in deciding whether a jury instruction is constitutional, courts must make a preliminary finding that the challenged instruction is constitutional, or at worst ambiguous, before considering these factors. The only way to avoid this potential circularity is to assume that the overall context can only be considered when jury instructions are ambiguous, not when instructions are facially unconstitutional.

This court finds that there was not "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" and DENIES Penry's motion to alter and amend the judgment on his mitigation instruction claim.

II. Conclusion

This court DENIES Penry's motion to alter and amend the judgment.

SIGNED on August 12 1999, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

APPENDIX E

CONSTITUTIONAL PROVISIONS AT ISSUE

CONSTITUTIONAL PROVISIONS AT ISSUE

AMENDMENT V TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.

AMENDMENT XIV, SECTION 1 TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

PENALTY PHASE TESTIMONY OF:

BELINDA ANDERSON
TRUDY ROSS
JESSE PENRY
LUCILLE ANDERSON

I have no further questions, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Did you see scars on the scalp, wh. you photographed them?

A Yes, we did.

Q Do you know if those showed up well on the photographs?

A It was a little difficult to tell because of the thickness of the hair.

BY MR. SMITH:

No further questions.

BY THE COURT:

Any other questions?

BY MR. PRICE:

No, Sir.

BY THE COURT:

You can step-down, Mr. Cavenaugh.

Who is your next witness?

BY MRS. LIEB:

Belinda Anderson.

BY THE COURT:

Belinda Anderson. Mrs. Anderson, if you will just raise your right hand and

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be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Okay. If you will just ·e a seat right there and after you get seated that mic will move around. Sounds like you don't talk very loud, so, you need to pull it up and talk into it so everyone on the jury can hear you. Alright, ma'am.

BELINDA ANDERSON

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Please state your name?

A Sally Belinda Anderson.

Q Where do you live?

A Dickinson, Texas.

Q How old are you?

A I am thirty-one.

Q Are you married?

A Yes.

Q Do you know Johnny Paul Penry?

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A Yes.
Q And, what is your relationship with him?
A He is my brother.
Q Are you older or younger?
A I am younger.
Q By how much?
A Two years.
Q Did you have another brother and sister?
A Yes.
Q Now, you have been convicted of a crime, is that right?
A Yes.
Q What was that?
A Burglary of a habitation.
Q Okay. And, in what county was that?
A It was Eighty-Two, Eighty or Eighty-Two.
Q And, how old were you?
A Probably about twenty, maybe.
Q Lets talk about Johnny and his growing up a little bit. Did Johnny go to school?
A Yes.
Q Do you know what grade he attended?
A First grade.
Q Did he attend school after that?
A Yes.

Q Well, lets go back to the first grade. Did he complete the first grade?
A No, he didn't.
Q He did not?
A He did not.
Q And, you said that thereafter, he went to school again?
A Yes.
Q And, where was that?
A Mexia State.
Q What is Mexia State?
A It is a school for the mentally retarded.
Q And, how old was Johnny there at Mexia?
A Close to fifteen, not quite sure on that, but, he was there a couple of years at least, the best I can remember.
Q When you say twelve or fifteen, that was about how old he was?
A Yes.
Q Now, did you and your brothers and sister attend school regularly?
A Repeat that, please.
Q You and your brothers and sisters all went to school?
A Oh, yes.

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Q In the normal course, first grade and on?
A Yes.
Q Now, when Johnny was a little kid, did he learn to read and write?
A No.
Q And, when he got back from Mexia, could he read and write?
A He could spell his name, and I think he could spell cat, and maybe dog.
Q Did you work with him to try to get him to read and write?
A Yes, we all did.
Q Who was that?
A That was my dad, my aunt and us other kids.
Q Do you now know that he can read and write at a relatively low level?
A Yes, from what you told me, yes.
Q Do you think Johnny is retarded?
A Yes.
Q What makes you think that?
A It is hard for him to comprehend things. They don't come easy with him. You have to sit there and talk to him for a while before they actually begin to sink in.
Q Did Johnny spend lots of periods of time locked in

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a room?
A Yes.
Q And, where were you living when that happened?
A We were living on Brew Street in Baycliff.
Q That was before he went to Mexia?
A Yes.
Q How long was he locked in this room?
A From eight hours on up.
Q And, who would lock him in there?
A My mother.
Q And, did you ever let him out?
A During the day while she was at work, yes.
Q I couldn't understand.
A During the day while she was at work, when she went to work, we did let him out.
Q Were you afraid, back then what would happen to you and/or Johnny if she found out that you had let him out?
A Several times she come home early and we got in trouble, Johnny got beat.
Q Would the family have supper together?
A When Daddy was home, we all ate together.
Q Did Johnny participate?
A We all ate together when Daddy was home.
Q How often was Daddy home?

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A Maybe twice a week at supper time. Lots of times he was late coming home.
Q Did he work long hours?
A Yes, he did. He was holding down many jobs, once.
Q And, when he was not there, what would Johnny do about supper?
A He would do without if he wasn't good.
Q How long would he go without supper?
A About five days out of the week.
Q Is there a bathroom in that room?
A No, there wasn't.
Q Could he get to a bathroom?
A No.
Q What would he do about going to the bathroom?
A He would go to the attic and take a poop.
Q But, he could get to the attic from his room?
A Yes, the attic entrance.
Q Did the room smell?
A Yes, it did.
Q From what?
A From urine and bowels.
Q Is your father still alive?
A Yes.
Q What is the state of his health?
A Well, he has had another stroke, and they found

some kind of a tumor or something on his brain. They don't know if it is malignant or not, still running test.
Q Is your mother still alive?
A No.
Q Now, when you had let Johnny out of the room, what sort of things would he enjoy doing?
A We would sit out underneath the fig trees and play cards with him and try to have fun with him, you know.
Q Was your mother affectionate with Johnny?
A No.
Q Ever see her hug him?
A Twice.
Q And, that's it, twice in over the years that you were growing up?
A Yes, ma'am.
Q Did your mother call Johnny names?
A Yes.
Q What words would she use?
A Well, the main thing, was "Blackie Carbon."
Q Why did she use that word?
A She got it off of a commercial, but, she would get hateful like, she was ashamed of him, like she didn't love him or something, you know.

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Q She called him other names?
A Yes, she called him short little bastard, and mother-fucker and all kinds of filthy words.
Q What would the tone of her voice be?
A Hateful.
Q Did you see your mother beat Johnny?
A Yes, I did.
Q How much would she beat him?
A After a while, it was practically an everyday affair.
Q And, was it normal discipline or just a beating?
A It was a beating. Belt buckles, belts, it didn't matter, brooms, toy brooms, sticks and mop sticks, and anything she could lay her hands on, or her feet, stomp on him and stuff, and didn't matter to her.
Q Did she ever threaten to blind him?
A Yes.
Q What would she do?
A He would look at her wrong or something and she would just threaten to scratch his little eyeballs out.
Q Would she do it?
A No, we would stop her. She would put her nails on his face and stuff, and we would stop her.

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Q Did your mother use punishment on him while kneeling?
A That was about an everyday affair, too.
Q How long was Johnny forced to kneel?
A Sometimes, two hours, four hours, - e hours. Always happened while Daddy was at work.
Q What would trigger your mother's beatings of Johnny?
A Pardon me?
Q What would trigger them, the beatings?
A Anything. She could be drinking, could look at her wrong and didn't matter, he would say I love you, Mommy, Anything.
Q You mentioned a time that your mother picked him up?
A Yes.
Q Beat him with a mop that your aunt had given him. Can you describe the mop?
A It was a little mop and broom that my Aunt Jane got him.
Q How big was it?
A It was kiddie size, little biddie short thing.
Q Can you tell me about how many feet it was?
A Probably about two and a half, maybe three.
Q What was it made of?

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A It was wood.
Q And, what did you see your mother do with the mop and broom?
A Beating him with it and breaking it over his head and his back and his legs and where it would hit.
Q What did Johnny say?
A Please stop, Mommy, please, I love you, Mommy. Don't hurt me no more.
Q Do you remember another time when your mother ran hot water on Johnny?
A Yes.
Q Where were you?
A I was sitting on the toilet taking a "pp" and Mama went into Johnny's room and Johnny had wet the bed again and Mama started running hot bath water, and you could see the steam rising up out of the shower. She drug him by the nape of his neck, like a little dog, by the shirt, back of his shirt, and she threw him in the bathtub and she held his head down with his face in the drain, saying, I ought to just drowned you, you little bastard.
Q She said, drowned you, little bastard?
A Just drown you, little bastard.

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Q What did Johnny do?
A He started fighting and that is when she wanted to -- his eyeballs out, pulled him out of the tub.
Q Do you remember another occasion wi the mother forced Johnny to drink his own urine?
A Yes, or he had to go and "pp" and he was banging on the door, wanting out to go to the bathroom.
Q And, how old was Johnny at the time?
A I'm not sure. I think he was about five or six.
Q Five or six?
A But, it woke Mama up, him banging on the door, and Mama come in there, and he said, Mama I have got to "pp" and I am thirsty. So, she made him "pp" in the toilet and she made me go in there and watch.
Q Why did she want you in there to watch?
A I don't. I guess she got a kick out of it or something, I don't know. She always did that.
Q After he went to the bathroom, what did she do?
A She told Trudy to go get her a cup, and she went and got it. I can't remember exactly how she came in, came in with the cup, but, she dipped

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it in the commode and made him drink it and she said that's all your getting for today, so, you had better make it last.

Q How full did she fill the cup?

A She filled it up to the rim.

Q Did Johnny drink it?

A I saw him drink it and I had to go outside of the door.

Q Do you remember on another occasion your mother making your brother eat his own bowel movement?

A Yes, I do.

Q How old was he?

A He was about four or five, then, and I had just had a nightmare and I wanted to crawl in bed with Mama, and Johnny was in the doorway, she was facing Johnny, with our heads up against the wall and she was facing Johnny in the doorway.

Q And, what was Johnny doing?

A He was kneeling on his knees.

Q And, what did she make him do?

A I walked by and I smelled a bad smell and I looked at Johnny and he was sitting there, he was on his knees eating his own bowel movement out of his own drawers.

Q I'm sorry, I didn't hear you.

A He was on his knees, eating his own bowel movement out of his own drawers, his panties.

Q Was he wearing the panties he was eating something out of, or was he wearing a separat pair?

A No, he was wearing a separate pair.

Q What, did he hold the panties?

A He held them in his hand, cupped them in his hands.

Q What was his reaction to that?

A He was holding it and he was looking everywhere but, Mama's direction, he looked like he was really ashamed.

Q What did she do at this time?

A She was sitting there on the bed drinking a Dr. Pepper and watching him.

BY MRS. LIEB:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Are you married, Mrs. Anderson?

A Yes.

Q Do you have children?

A No.

Q Do you recall -- well, you testified that your

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brother went to the first grade, is that right?
A Yes.
Q Do you recall that he actually went through the entire first grade year and failed?
A No, I don't recall.
Q You don't recall that?
A No.
Q Do you recall, or do you know that in the second, -- the second time that he started through the first grade, that the school officials recommended that he be put into a special education class because he was a behavioral problem in school? Do you know anything about that?
A I was down there --
BY MR. SMITH:
Can we approach, Your Honor?
BY THE COURT:
Yes, Sir.
BY MR. PRICE:
Why can't they state their objection, if they have got an objection, from here?
BY THE COURT:
You all can approach the bench.
REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH

BY MR. SMITH:
The Motion in Lemine, Your Honor, he is required to approach before he goes into prior bad acts, and what he is going to do, is to take a lot of hea ay that comes in from Johnny's mother and ask her if she knows, that is just to get it before the jury, and no way is that appropriate.
BY MR. PRICE:
Behavioral problems in the first grade?
BY THE COURT:
Okay. So far, what he has asked I am going to overrule. If you have another objection.
BY MR. SMITH:
Yes, I do.
BY THE COURT:
That objection is overruled.
(END OF CONVERSATION HELD AT THE BENCH.)
Q Do you know whether or not that the reason that he failed the first grade was because of behavioral problems?
A I'm not sure.
Q Ma'am?

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A I'm not sure on that.
Q Okay. Whatever the record shows on that, I guess that would be the way that it would be?
A I know my mom pulled him out.
Q Okay. You think then he was put in special education school down in Dickerson there, put in special education classes?
A I'm not sure on that. All I remember is that the first grade and Mexia.
Q Well, that is a pretty good jump from the first grade, six years old, and how old was he when he went to Mexia?
A He was about twelve, about.
Q Talking about five or six years, you don't know what happened to him in five or six years there?
A He was at home a lot of times.
Q He never did go to school?
A I would think.
Q You don't recall him going to any kind of special education school in Dickerson?
A No, I don't.
Q Okay. You didn't know anything about his problem at school, behavioral problem, as opposed to mental retardation problems, did you know that?
A No.

Q Okay. Do you recall much about when he was in the first grade?
A Very vaguely. I remember Mama took him out because she was mad at him for some reason.
Q Would it surprise you to know that he went the entire year to the first grade, and started the second time around in the first grade, and then, was put in a special education school? Is that the way the memory is?
A No, my memory is just the first grade. I remember Mama pulled him out.
Q Okay. The records indicate the school recommended that he be pulled out because he was such a behavioral problem, he couldn't be controlled at school. Would you disagree with that any?
A I don't know. I was young.
Q That could have happened, then?
A Yeah.
Q Okay.
A Possible.
Q He was put in Mexia and stayed up there about three years didn't he?
A I'm not sure how long he stayed up there. I know it was a while.
Q I think you testified a while ago, that he was

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how old when he went in Mexia?
A About twelve.
Q He was about how old when he came out?
A Maybe fifteen, I'm not sure.
Q About three years?
A Two or three, I don't know.
Q Your father took him out of Mexia, though, didn't he?
A Yes.
Q They didn't discharge him?
A I'm not sure. Daddy did all of the paperwork, we were kids.
Q You were what, how much younger are you than him?
A Two years.
Q He was fifteen when he came out of there, then, you would be thirteen. You can't remember that?
A No, there is a lot of things I don't remember about my life.
Q But, you can remember all of that abuse that happened when you were two and three years old?
A I had to watch it.
Q I see. But, you don't know anything about when he came out of Mexia?
A I remember we went up there to pick him up, that's

all I know.
Q For Christmas in 1971, and brought him home. Does that sound about right to you?
A I'm not sure on dates.
Q Okay. You remember your father di bring him home?
A Yes.
Q And, he didn't take him back?
A No, he didn't take him back.
Q Do you know why he didn't take him back?
A Well, I thought Johnny was released, I thought that they had called.
Q You didn't know it was because of his homosexual activities?
BY MR. SMITH:
Objection, Your Honor.
BY THE COURT:
Overrule the objection.
BY MR. SMITH:
Move to strike the testimony.
BY THE COURT:
Motion to Strike is denied.
Q Your father never indicated that to you?
A I was young back then, I don't --
Q Thirteen years old?

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A Daddy never discussed things like that with the kids, alot.
Q Okay.
A If that is what --
Q Lets talk about some of this abuse, this horrible abuse.
A He wanted -- mainly he wanted to make up for Johnny, what Johnny lost.
Q Lets talk about back earlier when all of this horrible abuse that you so vividly described to the jury, you remember telling your father about all of that when he would come in?
A The other kids were scared.
Q You never told your father at all about any of that?
A No, I didn't.
Q He doesn't know anything about it to this day does he?
A He does now, after Mama died.
Q Talking about your father a while ago, he is not an invalid or anything is he?
A No, he's not.
Q He is working, isn't he?
A Yes, he is.
Q Where does he work?

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A He works at Walmart.
Q He lives with you, doesn't he?
A Right.
Q What would you say about the proposition that he doesn't know or doesn't agree w: you as to all of this abuse? Have you got an explanation for that?
A All I know is Daddy had a stroke, two strokes, since all of this has happened, and now, he has got the brain tumor in his head, if that is what it is. They are still running test.
Q So, that has caused him to forget about all of this?
A Daddy is going blind in one eye, and he lost half of his memory.
Q I see, the half he lost, I guess, must have been about all of the abuse?
A Daddy didn't know nothing about the abuse until after mom and dad divorced, and us kids got up enough nerve to tell him.
Q How many years did all of this abuse go on?
A Eighteen years because that is how long they were married.
Q I'm talking about your mother, all of this abuse that you just said, told this jury your

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deceased mother perpetrated on this Defendant over here. How many years did that go on?

A Until he was in Mexia State.

Q And, you said that was about twelve years old?

A About.

Q And, your father never knew about it?

A Never knew.

Q How often have you visited Johnny in the last ten years, since he has been in prison?

A Well I have been out of state in California and Arizona, so, it has been hard.

Q How many times have you visited him?

A None.

Q Ma'am?

A None.

Q When did your mother die?

A I think she died back in '80.

Q She has testified for Johnny before, hasn't she?

A Yeah.

Q You haven't, though, have you?

A No.

Q Trudy testified for Johnny before, hasn't she?

A Yes.

Q Would it surprise you that she does not, apparently, did not know anything about all of this

abuse that you just described to the jury?

A Trudy?

Q Right.

A Wrong.

Q She does know about it?

A She does.

Q Okay. But, if she didn't testify about it before, that would be one of those things?

Is it your testimony that your mother would lock Johnny in the room during the day while your father was working?

A Yes.

Q And, when your father would come in at night, what would happen?

A If Johnny didn't have trouble, we would all eat together. Johnny would eat if it was early enough, if supper had already been served or something, Mama would say Johnny has already eaten, make him go without eating.

Q Your father ever talk to Johnny?

A Yes.

Q Johnny didn't tell him about any problems?

A Johnny didn't comprehend much, and Daddy was away alot and he was holding two or three jobs down, plus Mama's foot operation, he was also

looking after her.
Q When was that?
A It was when we were living in Baycliff. I'm not quite sure of the date or time, and all of the abuse was going on, too.
Q Then abuse that you described to this jury at some length there awhile ago, was rather extensive horrible and lasted, based on your testimony, as I understand it, for a period of about twelve years, is that correct?
A Can you repeat that?
Q The abuse that you so vividly described to the jury a few minutes ago, --
A Yes.
Q -- was rather horrible, it was a constant thing that occurred on a regular basis, and lasted for about twelve years, is that correct?
A It was about -- alot constant, about, probably five days out of the week.
Q Okay. And, she would keep him locked in the room all day long, is that correct?
A When us kids were at school, I would imagine that is where Johnny was kept while she was at work.
Q Your testimony about he would be required to use the bathroom in his own room, there, she would

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make him do that?
A No, he wasn't made to do that, just, he would beat on the door, nobody was home, evidently, he would beat on his door, and beat on the door saying I got to go, I got to go, and then, . was forced to use it in his room.
Q Did your mother work during this period of time?
A Yes, she worked, like I said, she managed at times, she managed at one time a Stop and Go.
Q She worked days or nights?
A Sometimes both.
Q Didn't she work alot of nigh shifts during those years?
A I'm not quite sure.
Q You didn't remember that?
A No. I know she worked nights and days, she was managing seven Stop and Go's, she had to visit all of them.
Q She worked quite a bit, too?
A Yes.
Q Okay. I take it you were in school several years during the time that this abuse was going on, were you not?
A Yes.
Q Did you ever report it to anybody at school?

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A We were afraid back then. Back then, child abuse didn't seem like it was legal, because everybody was getting it. It is more open and out in the area now.
Q So, I take it, the answer to my question is you did not?
A I did not.
Q Okay. You didn't tell your father about it, either, your own father about it either?
A We were afraid.
Q Afraid of who?
A Mom.
Q Okay. Afraid to tell your father because you were afraid of your mother?
A Right.
Q Okay. Where were you convicted of burglary?
A In Granberry, Texas.
Q Burglary of a habitation or burglary of a building?
A Habitation.
Q Okay. First degree felony, isn't it?
A Yes.
Q What kind of punishment did you get for that?
A I got five years probation.
Q When was that?
A It was right after mom died, probably about

'81, '82, something like that.
Q You never told any school officials about it, and you never told your father about it. Who did you ever tell about it?
A We all kept it to ourselves.
Q When was the first time that you ever told anybody about it?
A When mom and dad finally got a divorce, we told Daddy.
Q Told your Daddy at that time?
A Right.
Q When they got a divorce? When was that?
A After eighteen years, I'm not sure, not quite sure the year was.
Q You don't remember when they got a divorce?
A I'm not sure.
Q How old were you?
A In the seventies, sometime, I was about eleven or twelve.
Q That's when you told him?
A Yes.
Q Did he believe it?
A Yes. He bowed his head in his hands and cried.
Q Did your mother do anything physically to Johnny that caused cuts, scars, bruises, whatever, things

of this nature to him?
A He has got scars on the back of his legs, the back of both legs. Asfaras hurting him, if it was an accident, I don't know, because I wasn't born then.
Q That happened when he was two years old, when he got burned in the hot water?
A She claimed it was an accident.
Q So, did your father claim it was an accident, too, didn't he?
A Yes.
Q He was present when that happened, too, he was home when that happened?
A I don't know. I wasn't born.
Q Okay. Aside, -- since your recollection, since you were born, since you remember, you were telling the jury, about all of these bad instances. What I want you to do, is tell me about any instances about where she did anything to him that was physical harm to him, caused bruises, cuts, burns?
A She used to beat him with an extension cord, belt buckles, belts.
Q Did they leave marks on him?
A Broomsticks.
Q That leave marks on him?

A Yes.
Q Bruises on him?
A Bruises.
Q Cuts?
A I'm not sure if he ever got cut. I hink she hit him on top of the head, right on top.
Q Are you telling this jury, this type of activity goes on for ten or twelve years and your father never knew about it?
A My father worked full time.
Q Twenty-four hours a day, seven days a week?
A Not like you and I do now, but, more. He had to walk home, Texas City to Baycliff.
Q He did come home?
A Yes.
Q He did see ya'll occasionally?
A Yes.
Q Weekly I would assume, he would see you two or three days awhile ago, when he would come home for supper two or three times a week?
A In time for supper, I said.
Q And, Johnny would eat with you all, is that correct?
A Johnny would eat with us when Daddy was home for supper.

Q Your father never knew about these beatings and scars?
A No, Mama kept it from him for so long.
Q Was she abusive to you?
A After I had already grown, I think he gave me a bloody nose and black eye, I can't remember which, but, no, I was her favorite.
Q What about the other children?
A I remember her slapping Trudy around, and she broke Jessie's arm, blamed it on me.
Q Broke his arm on purpose?
A She was beating him because he didn't clean the yard up, and slammed the door on him.
Q Anything else?
A He was locked in Johnny's room with Johnny a lot of times, Jessie.
Q Tell your father about that?
A Yes, after Mom and him got a divorce we did.
Q You never told him about Jessie, never even told him when he broke his arm?
A Mama lied to Daddy and blamed it on me, saying he was playing on the coffee table and I pushed Jessie off.
Q Did you tell it different?
A No, we was afraid of Mama.

Q Okay. Your mother and daddy were separated at different times as you were growing up, weren't they?
A Yes, but, asfaras remembering any of them, I don't.
Q But, you know what I am talking about, don't you?
A Yes.
Q She would be gone sometimes for several weeks?
A I know she drank alot and I know she went out maybe one night a week and whatever, and got lost for a night or two, but, she would come back hom.
Q Sometimes she would be gone for several weeks?
A What I heard.
Q You don't remember any of that?
A I don't remember any of those.
Q All you remember is that she was around all of the time?
A I know that she was around. All I remember mostly is bad things that she did to us kids, Johnny, especially.
Q Got a real good recollection of that?
A I sure do, I mean, it sticks in a kid's mind.
Q Yeah, and your father never knew anything about it?

A My Daddy didn't know until after they divorced.

BY MR. PRICE:

I have no further questions.

BY MRS. LIEB:

No questions, Your Honor

BY THE COURT:

Okay. You can step-down. Who is your next witness?

BY MR. SMITH:

Trudy Ross.

BY THE COURT:

Trudy Ross, Mr. Martin.

If you will raise your right hand and be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Just have a seat. I would ask you after you sit down move that mic to where you can speak into it, so, everyone can hear you. Alright.

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TRUDY ROSS

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Where do you live, Mrs. Ross?

A I live in Coolridge, Arizona.

Q Married?

A Yes.

Q Children?

A I have three boys.

Q What was your name before you were married?

A Penry.

Q Are you related to Johnny Penry?

A Yes.

Q You are his sister?

A Yes.

Q Older or younger?

A I am older.

Q You are the oldest?

A Yes.

Q How much older than Johnny are you?

A Two years.

Q You grew up with Johnny?

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A Excuse me?
Q Did you grow up with Johnny?
A Yes, I did.
Q You tell the jury whether or not you think that Johnny is mentally retarded?
A Yes, he is.
BY MR. SMITH:
May I approach, Your Honor?
BY THE COURT:
Yes, Sir.
Q I am going to ask you to look at Defendant's Exhibit Number Ten, already in evidence, that has been identified as a photograph of the back of your brother's legs. Do you see the spots of lighter skin on that?
A Yes.
Q Do you recognize those as scars?
A Yes.
Q Did he have those scars when he was growing up?
A Yes, he did.
Q Do you remember any incident in Johnny's childhood that would account for those scars?
A Yes. Can't remember, but, when I was about four he was two, he was scolded in the sink, and then, there was another time, when he was about three

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or four, my mother made him stand on the sink in front of the heater, his legs facing the back of the heater, and I can remember blisters on the back of his legs.
Q Now, when he was scolded in the si you said he was two?
A Yes.
Q You were very little, yourself?
A Yes.
Q You have a recollection about it?
A I can remember being frightened and scared and Johnny screaming.
Q Who was scolding him in the sink?
A My mother.
Q Do you remember Johnny going to the hospital after that?
A Yes.
Q You also said that he would kneel in front of the heater. Who made him do that?
A My mother.
Q And, where was she when she was doing this?
A She was in the same room, lying on the bed.
Q And, did he say anything to her?
A He wanted to get up and go you know, away from the heater, and he said that it was hot, she wouldn't

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let him.

Q You say, you remember blisters on his legs?

A Yes.

Q In general, Mrs. Ross, how did your mother treat Johnny?

A She was cruel to him.

Q Did she hit him?

A Yes.

Q What did she hit him with?

A She hit him with a belt, usually, the side with the buckle, and switches, anything that she could find, and slapped him, clawed him, hit him, and one time she broke a child's broom on him, she hit him with it.

Q A child's broom? Do you know who gave Johnny that broom?

A Yes, my dad's youngest sister, Jane, brought him a little broom and mop to keep his room clean with and my mother broke the broom on him.

Q Did she beat him often?

A Yes.

Q How often?

A Quite often. It seemed like he always had fresh marks on his back.

Q Did she ever use cigarettes or anything like

that on him?

A Yes, she would put them to his skin.

Q Did she beat her other children?

A Yes.

Q Did she beat them the same way she at Johnny?

A She was cruel, but, not like with Johnny. It was quite different the way she treated Johnny.

Q Did she seem to have some special feeling about Johnny?

A She had a hatred for him.

Q Did she ever punish Johnny by making him eat or drink anything?

A Yes. She had -- I had witnessed her making him eat his own increment, and also, drinking his own urine.

Q Can you remember specific times when she had made him drink his own urine?

A I can remember when we were out somewhere in the car and Johnny had used the restroom in a coke bottle, and she came out -- he was afraid to go outside of the car and do it, he was really afraid to do anything just, you know, what to do, he was always afraid, and she came out to the car, and she forced him to drink it, and she was real hateful and mean to him, and she even held the

bottle and forced him to drink it.

Q Was Johnny ever kept locked in his room when he was a child?

A Yes.

Q Locked in there for a long time?

A Yes. At this time, it wasn't intentionally that way, it was suppose to be to protect him at night, but, Daddy didn't know that Mama was locking him in all the time and keeping him in there sometime for days without food or water.

Q Did he come out when your father came home?

A When Daddy would come home and he was in time for supper, my mother let him out before Daddy came in, and it was like he hadn't been in there, but, when Daddy would come home, we would eat together and it would be like, things weren't even happening, but, if Daddy didn't come in on time and mother, was the one that came, you know, he didn't come in before supper, late for supper it was like Johnny was put in his room after supper, and he would ask if he had eaten, and Mama would tell him yes, but, he really hadn't.

Q When he was in that room, what was Johnny suppose to do if he had to go to the bathroom?

A Suppose to tell Mama so, she could let him out,

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let him go to the bathroom.

Q Okay. If he didn't tell her, what happened?

A Well, when he had to go, he would beat on the door, Mama would come in there and be real angry at him, she would slam the door and start beating on him wouldn't let him go to the bathroom, and sometimes, she would, and other times, I guess, it all depended on her mood, and then, she would beat him and lock him back in there, and he would go in the room and he would get a whipping, and she seemed to find a reason to go in there and see, find it and would spank him.

Q How did that room smell?

A Atrocious.

Q Do you remember an incident in your childhood, involving a knife?

A Yes.

Q Tell us that story, as you remember it.

A I can remember my mother coming home, she was very enraged, she was home late, late hours of the night, and I can remember -- I don't remember if she started at Johnny first, or if I was the first. I just remember her kicking me and ripping my dress off, and my Dad sending me to my room, and my room was just right across from Johnny's

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and I remember her in there, and she was saying I was going to cut his privates off, so, you won't do this anymore, and she went and got a knife and was actually going to do it.

Q She was going to cut his privates .

A Yes.

Q Did she use the word privates?

A No, she normally used fulgar language, when it concerned Johnny or when she was enraged.

Q You said, she went and got a knife?

A Yes.

Q Did she take that knife into Johnny's room?

A Yes, and I can't remember -- I don't remember how my Dad -- I just know that he was there, and I remember a lamp or some object being crashed to the floor, and I remember my Dad holding her and trying to take the knife from her, and my memory, I can remember him slapping her, but, my Dad was never violent with my mother, this is the only time I can ever remember him being violent with her, and he was trying to reason with her, and I can remember screaming, Johnny was screaming, please, no, Mama, please, and that's it.

Q Could you describe the knife for us?

A I was about this long, had a black handle, and

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it was wide towards the handle and it came to a point at the end of the knife.

Q Did you believe that she was really going to use the knife the way that she said?

A Yes, I was very scared, I was real. scared, I was even screaming.

Q What did your mother use to call Johnny?

A Seems like her favorite was Little Bastard.

Q Did she use that name affectionately?

A No.

Q Did she ever show love to Johnny?

A Sometimes after she had been beating him, which was very seldom that she did do this, but, she would hold him to her and say I'm sorry, Mommy loves you and he would say I know that you love me, I love you too, Mama, and then, there was times when around Dad that she would be a little stand offish, but, show more love towards him than normal, and around other people she would be different.

Q When there was visitors at your house, did her treatment of Johnny change?

A Yes, she always made sure that he had a shirt on whenever there were other people there be like nothing was happening.

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Q Was there a reason that she always made sure that he had a shirt on?
A Yes, because the marks on his back all the time.
Q Was Johnny an affectionate child?
A Yes.
Q Was he loving to his brothers and sisters?
A Yes, he would often, even when Mama would be coming, we would try to put him back in the room, and he would thank us for letting him out and he knew all the time that we were going to get a spanking, and he would take the blame and said that he did it, so, we wouldn't get spanked for it.
Q Is it true, Mrs. Ross, that you testified earlier in this case?
A Yes.
Q You didn't tell all of the details that you are telling now, did you?
A No, I was a little reluctant in dealing with a lot of details.
Q Is there a reason for that?
A Yes.
Q What was the reason?
A My mother was there.
BY MR. SMITH:
Pass the witness.

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CROSS EXAMINATION

QUESTIONS BY MR. PRICE:
Q Mrs. Ross, are you still married?
A Yes, I am.
Q Where do you all live?
A Coolridge, Arizona.
Q Where did your mother live?
A My mother?
Q When she died?
A She was living, I believe in Fort Worth.
Q Fort Worth? Moved back to Texas. Wasn't she living in Arizona about ten years ago, herself?
A I really don't know. My mother lived a lot of places. I wasn't around my mother that much after she left.
Q You had testified before on behalf of your brother, have you not?
A Yes.
Q And, as Counsel just pointed out, you didn't testify about all of these details of abuse at that time, did you?
A No.
Q Are you telling this Court and this jury, now, under oath, that the reason for that was because your mother also happened to be in the same town

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or in the same Courthouse?
A She was in the same Courthouse, yes.
Q So, what effect did that have on you?
A It scared me, it frightened me.
Q When you were in the Courtroom tes. 'ying, she was outside, she couldn't come in just like this trial, other witnesses can't come in, can they?
A Yes.
Q And, that was the way that it was at that time, wasn't it?
A Yes.
Q But, she didn't know what you were testifying to?
A You know, I would not know if someone, somehow would tell her something. I was afraid.
Q Alright. How old were you then?
A I am thirty-six.
Q You were twenty-six then, I guess?
A About that.
Q Okay. Your father knew about all of this abuse I take it, then, didn't he?
A He was working all the time. He really didn't know the extent of it. He was trying to help mother, he knew that mother had mental problems, and, he tried to help her, he tried to help her.

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BP-A2-13

Q What is the answer, did he know about the abuse, or didn't he know about the abuse?
A I don't think he knew the extent of it. I really don't know. Working all the time, when he came in, everything was normal, when he uld come home.
Q You are two years older than this Defendant, are you not?
A Yes, Sir.
Q What period of time, over what period of time, did all of this abuse take place, that you recall?
A The first I recall it was when Johnny was scolded, in the sink, that is from the first that I remember that it started.
Q When his legs got burned in the sink?
A Yes.
Q Your father was home when that occurred, wasn't he?
A I don't remember.
Q Ma'am?
A I don't remember.
Q You do not remember that?
A I just remember being frightened, is all that I remember. I remember what happened. I do not remember who let him in or anything, I just don't remember that part.

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Q You remember when he got burned in the sink, is that right?
A Yes.
Q You don't recall how it happened?
A I was only four, barely four, I jus a child myself, I just remember, --
Well, it would just kind of kept kind of quiet, but, I know that my mother was bathing him, he was screaming, I can remember that, and I can remember him coming home from the hospital.
Q Can you also remember that what she did was leave out of the room and he got the water turned on, or not?
A I don't remember.
Q And, he was on the other side of the sink, and he actually got into the water and burned himself?
A No, I don't remember that. I just remember that I was frightened and scared.
Q Well, obviously, anytime anybody is injured like that, you were four years old, that would stand to reason you were frightened. You are not setting here and telling the jury, you are not testifying under oath that she intentionally burned his legs like that are you?
A Yes.

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Q You are telling the jury that?
A So many things that she did do to him.
Q How do you know that?
A Because I saw it.
Q Oh. Maybe I just misunderstood yo testimony. I thought that you said that you couldn't remember anything but, just --
A I saw him there in the sink, with my brother. I said I didn't remember my father being there.
Q But, you remember your mother? What did she do, hold his legs under the water and burn them, is that what she did?
A She was standing there while he was screaming.
Q Ma'am?
A I remember her standing there while he was screaming.
Q Yes ma'am, but, there is a difference between that and if she testified that she had gone out of the room and he got in the hot water and she came running back in the room and got him out of the water and then, she carried him to the hospital?
A She didn't run back to rescue him, no.
Q What do you remember?
A I remember her staying there over him while this

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was happening.

Q So, you are telling this jury, that she just burned him?

A Yes.

Q Okay. But, you didn't tell that u. ır oath the last time that you testified, did you?

A No.

Q Sure didn't. You said she always made sure that he had a shirt on, is that right?

A Yes, she did.

Q Because he had marks on him?

A Yes.

Q What were these marks from?

A From belts, switches, he had claw marks on him, too. My mother had long nails, and she clawed him.

Q Clawed him?

A Yes.

Q And, she hit him with belts?

A Yes.

Q Did they ever cut him?

A Yes, he had deep marks in his back, deep marks.

Q So, she kept shirts on him all the time?

A Yes.

Q You didn't testify about that, before, either, did

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you?

A I don't remember.

Q You haven't read your testimony from before?

A No.

Q You haven't?

A No.

Q Okay.

A I really don't remember what all I said last time.

Q Do you remember testifying before Johnny was mean to his brother, little brother Jesse?

A No, I don't recall.

Q Do you recall that now, that he was mean to Jesse?

A No, Johnny was never intentionally mean.

Q Never was?

A Excuse me?

Q Never was?

A No.

Q I am going to direct your attention back to one time previously that you testified and in response to a question from me, I asked you, "Ms. Penry," and I believe your name was Penry at that time, is that right?

A Yes.

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Q "Isn't it a fact that Johnny Penry was mean towards his younger brother, Jesse, is that correct? "Yes."

A My mother was mean to him, to my younger brother Jesse.

Q The question here was, whether Johnny Penry, this Defendant, was mean to Jesse, and your answer was yes, it was?

A He was never intentionally mean to him.

Q Then, I said, "Did this go on for several years?" And, your answer, "Yes, Sir." "Question, He also had problems with other children in his own peer group or his own age, didn't he? Answer: Yes."

A Well, he was mentally retarded and he was abused at home.

Q Yes, ma'am. I am asking you about violence, now.

A I never said he was mean and cruel to other children. He just didn't act normal around them.

Q Are you saying that this testimony didn't occur, that I just read to you?

A No, but, I am telling you what I meant by what I said.

Q I am just going by just what you were asked and what you answered. You were asked, "Was he mean

towards your brother, Jesse? And, your answer was "Yes," and I asked you then, "Did this go on for several years," and your answer was "Yes, Sir." Also, do you recall testifying about him taking a sharp object and picking the skin off the bottom of his brother's feet? Do you remember that?

A I don't recall testifying to that.

Q You don't? Do you ever recall that you testified that he would get violent at time at home with you all?

A No, I don't.

Q See if this refreshes your recollection. "Question, of course, this information had to be related to the doctor by someone. Would you say that whoever gave that information was in error?" And, we were talking about some information that was given to doctors about child abuse, and you said, "Well, no, because he would get violent sometimes with us at home."

A I don't recall saying that.

Q You don't recall saying that?

A No, Sir.

Q Okay. Do you recall when he got out of prison on that rape charge in 1979?

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A Yes, I recall that.
Q And, you recall that he went to live with his Aunt and Uncle?
A Vaguely. I don't remember everything that happened at that time. I was kept pretty b. myself.
Q Okay. We are not talking about thirty years ago now, we are talking about ten years. Do you remember, that, when he lived with your aunt and uncle for a little while?
A I remember that vaguely.
Q Do you remember that he had to move out from your aunt and uncle's move back in with your father, because they couldn't control him? You remember testifying to that?
A I remember him coming back to live with Dad,
Q Okay. You remember testifying that was because your aunt and uncle couldn't control him?
A They didn't know how to handle Johnny. Not that he was mean or anything, that wasn't the case. They didn't --it was a burden on them.
Q What did your father have to say about that stinking room that he was kept in?
A At what point are you talking about? I don't understand.
Q During the whole time that he was locked in that

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room in your home?
A He said, he would tell Johnny to keep his room clean and to tell Mama when he had to go to the bathroom.
Q He never thought that was because . stunk like that, that your mother was abusing the child?
A At the time I was just a child myself. I don't know what Daddy knew at the time that I was a child.
Q Okay. Well --
A All I knew is I was afraid to say anything myself.
Q Could it be, Mrs. Ross, that Johnny was a real bad behavioral problem?
A No.
Q That's not true?
A No.
Q How do you know that?
A Because Johnny was loving and affectionate and he liked to be around people and he liked to be treated just like every other child would.
Q You got a good memory of that, but, you couldn't remember the other side of it?
A Well, mainly because the others were the bad things, were more numerous, and they were wrapped more around my child-life than ten years ago. Alot

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of things I try to forget.

Q In other words, you remember more now than you did ten years ago, or you remember less now?

A I remember more ten years ago than I would now. I was afraid to say a lot then.

Q You sure didn't testify this way ten years ago, though, did you?

A I didn't testify against him.

Q You didn't?

A It was clear that my mother did abuse him.

Q You and your mother both testified for him, didn't you?

A I don't know how she testified. I didn't hear her testimony.

Q She didn't know how you testified either, did she?

A Not that I know of.

Q You are telling this Court that you went into that Courtroom and committed perjury, in effect, because you were afraid of your mother?

A No, at that time I told what I felt. I just withheld some things.

Q If you said that he was violent then, then, your memory was better then than it is now, is that what you just got through saying?

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A No.

Q That's not it?

A Not it.

Q How many times have you visited him in prison in the last ten years?

A I have been out of the State of Texas for seven to eight years, and I went to see him a couple of times before I did get married and leave Texas.

Q What, ten years ago?

A Yes.

Q And, since then, how many times have you been to see him?

A I haven't seen him until today.

Q You haven't seen him?

A No. I have talked to him on the phone a couple of times, but, I have not seen him.

Q Was his room fairly bare asfaras furniture and things of that nature?

A Well, at one time, it was a bed and a chester drawers in there and eventually there was just a bed and then, there was, I can just remember the frame of the bed, and then, I can remember just a mattress being in there and then, I can remember a time when there was nothing in there.

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Q Why did they keep stuff out of his bedroom?
A I don't know. It was just -- it was like it was Mama didn't want Johnny to have anything.
Q Okay. Let me see if this refreshes your memory ten years ago. You probably had a better memory then than you do now. "Question: Was there any reason that she kept things out of there?" Talking about the room, and your answer was, "Yes. What was that reason? Answer: So, he wouldn't hurt himself."
A That was the reason that we were given when we were children.
Q Okay. Okay.
A But, older, I can understand that, that wasn't really the reason.
Q Well, you were twenty-six years old when you gave that testimony under oath, were you not?
A Yes.
Q You were older then, weren't you?
A Yes.
Q And, you were under oath to tell the truth, weren't you?
A Also, I was reluctant because of my mother being there. I did tell the truth, but, I didn't tell the surrounding, the reason why.

PENDAFINDY MUNCIE, IN 47308
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Q Well, is it true that the reason that the room was kept bare was so that he wouldn't hurt himself?
A That was what reason that we were given as children.
Q Is that true as a twenty-six year old woman, did you believe that was the truth when you testified under oath to that?
A No, Sir.
Q Okay. So, you then, lie, then, under oath?
A No, I didn't, lie.
Q Okay.
A I just didn't give the surroundings of the statement.
Q Were you living with your father in 1979, when this Defendant came back home, after he had been living with your aunt and uncle and they couldn't control him?
A Yes.
Q Okay. You were living there, and I think, he stayed there about nine days before he was arrested for this murder, is that about right, nine or ten days?
A I don't recall how long it was.
Q How long had he been out of prison on that rape charge before he was arrested on this case?

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BF-AZ-13

A It was a short time. I can't remember how long.
Q A couple of months, something like that?
A Something like that.
Q You are two years older than the Defendant?
A Yes.
Q Did you know that your parents, your mother included, took him to the University of Texas Medical Branch in Galveston for testing when he was about eight or nine years old?
A I remember that they were getting him prepared to go to a state school to get help, but, I don't -- I don't remember when he went. I just remember him going there at one point in his life.
Q Lets back up. Do you remember when he went to the first grade?
A I wouldn't remember when he was in the first grade.
Q You would have been, what, the third grade?
A Third, yeah.
Q He failed the first grade the first year, did he not?
A Yes. Actually, he wasn't really in school that much, though.
Q Do you recall that the problem that he was having

at school was behavioral problems?
A Yes.
Q And, then, they suggested that he be put in a special education school, did they not?
A Well, I remember him being put into one, and I don't remember why, or exactly when.
Q Okay. Your mother and father were doing that, were they not?
A Yes.
Q Okay. All of this abuse going on during this time?
A Yes.
Q Okay. When he was going to school and going to the special education school, when, he was in the first grade?
A Yes. A lot of times he wasn't -- I remember Mama took him to Dickinson to a special school, I believe, and a lot of times she didn't take him.
Q What about the first grade?
A Alot of times she didn't send him to school, either.
Q If the records indicate it was because he was a behavioral problem, is that consistent with your memory?

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A That is, I remember, yes, it had to do with some behavioral problems, but, nothing to do with mental problems or anything like that, just he was an emotionally disturbed child.

Q Okay. But, he wasn't emotionally . sturbed around the house, he was abused at home, but, he was at school, he was emotionally disturbed?

A If you were abused, you would probably be emotionally disturbed, and other people, too.

Q What I am saying, you say at home, that he was a loving, tender child, never did anything of that type?

A As long as my mother when she was gone, we would sneak him out of the room, and yes, he tried, he tried to be -- to play with us and stuff, and enjoy himself, but, yes, he still had problems. He would scared wondering if my mother was coming, and he was scared, frightened.

Q But, he wasn't mean?

A No.

Q So, if you testified to that ten years ago, what is your explanation now?

A I don't believe I testified to him being mean, when we were children or anything like that,

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or in the sense, that he was intentionally mean.

Q What about his violence towards Jesse and others?

A He wasn't trying to hurt Jesse, h. would be -- they would both be trying to occupy themselves they had no toys there, they had nothing there.

BY MR. PRICE:

May I approach the witness, Your Honor?

BY THE COURT:

Yes, Sir.

Q I want to show you your testimony, Ms. Penry, just so that you won't think that I am inventing this some way or another.

BY MR. SMITH:

What page?

BY MR. PRICE:

Page 454, cross examination, about the third question, fourth question.

Q I ask you, and you read along with me here, "Ms. Penry, isn't it a fact that Johnny Penry was mean towards his younger brother, Jesse, is that correct?"

And, what was your answer?

SP-AZ-13 PENGAD/INDY, MUNCIE, IN 47302

A "Yes."
Q Okay. Is that your answer today?
A Yes.
Q Was he mean towards Jesse?
A He wasn't mean intentionally towar. his younger brother. I did not surround that answer with another comment. I didn't specify the happenings of what things went on, what happened, I just merely answered the questions.
Q And, the next question,"Did this, go on for several years?" And, your answer was,
A "Yes, Sir."
Q Okay.
A But, I was probably thinking about the whole thing that was going on with my younger brother, not just that, but, the thing with my mother, and everything surrounding it.
Q Then, the next question says, "He also had problems with other children in his own peer groups or his own age, didn't he?" And, what was your answer?
A "Yes," but I didn't say it was because he was mean to them.
Q Well, I think, that was what we were talking about, wasn't it, being mean to Jesse?

SP-AE-13 PENGRAPHICS, MUNCIE, IN 47305

A That was not testified, was he mean to other children.
Q Okay. Okay. I want to direct your attention to Page 456, of the transcript.

"Question: There have been so medical records that Johnny's lawyers introduced some medical records here yesterday, and in those records there are some indications that there was a lot of violence conduct that he exhibited particularly towards other children and I am talking about over a period of several years, starting back in the first grade area.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes, Sir. What do you need?

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Before the jury, reading a question from a document in evidence from a prior trial, which is not in evidence in that trial, being prejudicial and requests to strike it.

SP-AE-13 PENGRAPHICS, MUNCIE, IN 47305

BY MR. PRICE:

Proper cross examination. She has indicated that he wasn't mean or violent towards anybody, and in her prior testimony, just a one hundred eight degr[illegible]ifference.

BY MR. SMITH:

Those questions, I didn't object to that. That question, just recites that there were records that were in evidence, the trial record, but, no such records in evidence here, and I am going to oppose any records coming in here.

BY THE COURT:

Let me see the question.

BY MR. PRICE:

And, a couple of answers. This is a competency hearing, and incidently, this is not the capital murder trial.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

Just for the record, the objection is under the Fifth, Sixth, Eighth and Fourteenth Amendments to the constitution, corresponding with the Texas Constitution

BF-A2-13 PENGAD/INDY, MUNCIE, IN 47302

and Texas Code of Criminal Procedure.

BY THE COURT:

Still overruled.

Q I am going to direct your attention back to the question, Line 15, Page 456 of the [illegible]anscript.

"There have been some medical records that Johnny's lawyers have introduced, some medical records here yesterday, and in those records, there are some indications that were a lot of violent conduct that he exhibited, particularly, towards other children, and I am talking about over a period of several years, starting out back in the first grade area."

Was your answer, "Yes, Sir"?

A I wasn't answering yes, that he was being mean to the children. I was answering the question that are based on the medical records.

Q Okay. Next question. "But, of course, this information had to be related to the doctors by someone? Would you say that whoever gave that information was in error? Answer: Well, no, because he would get violent sometimes with us at home."

Is that your answer?

A I don't remember.

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Q Don't remember, oh, okay. I didn't misread is, though, did I?
A No.
Q You were still living at home when he went to Mexia State School, were you no?
A Yes.
Q Your parents got him into the Mexia State School, did they not?
A Yes.
Q They took him up there, did they not?
A As I remember it.
Q And, occasionally they would go visit him or get him and bring him home, on a furlough type thing?
A I don't ever remember them bringing him home, Don't remember moments of ever wanting to bring him home, and I remember going to visit him, and taking him out for maybe a couple of hours, I don't recall bringing him home. We could have but, I don't remember.
Q How many years was he in the Mexia State School?
A I don't remember that either.
Q Was it about three, be a ball-park figure?
A Perhaps, but, I don't remember.
Q You know about what age he was when he went in?

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A I don't remember, except maybe around twelve or something like that. I don't remember.
Q Did you ever go to the Mexia State School?
A Yes.
Q That is a school, too, is it not? It is not a hospital for the mentally ill or something?
A We were just explained that as children that it was just like a little community that he lived in. I really don't know what it was. I just know what Dad would tell us.
Q Did he ever tell you about any problems that he had up there at the school?
A I don't remember.
Q Do you recall testifying before that he told you that he didn't like it because he couldn't get along with the boys, with some of the boys up there?
A I remember him saying that he didn't like being there. I don't remember as to why at this date.
Q You also,recall that he also told you that he didn't like the teachers up there?
A I don't remember.
Q Okay. If you testified to that before, would that be accurate?

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A I don't even remember.
Q Let me show you your testimony from before and see if it refreshes your memory, a little bit.
BY MR. SMITH:
Can we have the page?
BY THE COURT:
What page, Mr. Price?
BY MR. PRICE:
Page 467. Start with Line 18.
Q "Did he ever talk to you about the Mexia State School? Answer: Once in awhile. Question: Did he like it? Answer: No. He talked about a lot of things that happened to him that weren't good and things like that. Question: What were some of the things that he would tell you about that? Answer: Well, he couldn't get along with the boys, there. He didn't like the teachers."
Is that your answers?
A Yes,
Q Is that pretty well the way that you remember it now?
A Yes.
Q Okay. Your father took him out of Mexia State School, did he not?

A Yes. I don't think my Dad ever really wanted him to be there. It was just to protect him.
Q Do you recall why your father took him out of the Mexia State School?
A Because he learned everything that wasn't proper.
Q Like homosexuality?
A Yes.
Q You think he learned it up there, is that what your father thought?
A That is what I was told. I don't know if that is what Johnny learned. I just know that is what Dad told me at the time when we were children.
Q And, when he took him out of the Mexia State School, your mother wasn't around at the time, was she?
A I can't remember. I remember he being there when we moved to Goodrich, and I remember my mom being there but I don't remember at what point in life.
Q Didn't they get a divorce shortly after that?
A My mother left.
Q And, didn't they --
A Shortly after we moved to Goodrich, my mother left.

Q And, they got a divorce sometime after that?
A Yes.
Q Did they get into a custody dispute also?
A Yes. It was a fight between the two of them.
Q Okay.
A For a period of time.
Q Do you recall when your brother may have gone to Austin State Hospital, and Rusk State Hospital on a commitment out of Harris County?
A I remember him being there, but, I don't remember why or when, or when he came home. I just remember that part in life.
Q He wasn't at home when he got committed to those -- to that hospital, was he?
A I don't remember.
Q Okay. Your memory is bad in that area?
A Well, I just -- I remember a lot of the incidents, but, sometimes, I don't remember before or after the incident.
Q You don't remember him getting into any kind of trouble in Houston, Texas?
A I don't remember.
Q Don't remember that?
A What happened, no.
Q When he was seventeen years old, how old would

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you have been?
A Nineteen.
Q And, you can't remember what happened when you were nineteen?
A No, I can't remember what happened that time.
Q Okay. But, you can remember what happened when you were four years old, when he got burned?
A Because I was scared.
Q And, all of those others?
A And, I was abused as a child, also, that is why I remember those things so well.
Q What effect has it had on you?
A Well, I, me, being abused, as a child?
Q Yes, ma'am.
A Well, it hasn't had a very good effect. It has made me want to do my children better than my mother did me.
Q Better or the same way?
A No, definitely not the same way.
Q Better?
A Yes, Sir.
Q And, you haven't gone out here and killed anyone, either, have you?
A No.
BY MR. PRICE:

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I pass the witness.

BY THE COURT:

Any other questions of this witness?

BY MR. SMITH:

Yes, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Mrs. Ross, is it hard for you to talk about all of these things that your mother did as a child?

A Very hard.

Q When Mr. Price read you a question talking about a medical record, you remember that?

A Yes.

Q And, the question said, information had to be related to the doctors by someone. Do you remember that?

A Yes.

Q Do you know who the someone was that gave the information to the doctor?

A No.

Q You don't know whether it was your mother?

A I don't remember. I don't know. I don't remember.

BY MR. SMITH:

Pass the witness.

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BY THE COURT:

Does the State have any other questions of this witness?

BY MR. PRICE:

Just a moment, Your Honor.

No further questions, Your Honor.

BY THE COURT:

Okay. You can step-down, Mrs. Ross. You are not to discuss your testimony with any other witnesses. You are under the rule, you understand?

BY MRS. ROSS:

Yes, Sir.

BY THE COURT:

Not to ask them what they said. At this time, we will recess for about fifteen minutes. You are still not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON AT 10:30 A.M. A FIFTEEN MINUTE RECESS WAS HELD.)

(JURY IN AT 10:50 A.M.)

BY THE COURT:

Who is your next witness, Mr. Wright?

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BY MR. WRIGHT:

Jesse Penry.

BY THE COURT:

If you will raise your right hand and be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Just have a seat. Okay. Mr. Wright, you can proceed.

JESSE PENRY

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Would you state your full name for the record, please, Sir?

A Jesse DeWayne Penry.

Q Where do you live, Sir?

A 464 West Army, in Coolridge, Arizona.

Q How old a man are you?

A I am twenty-eight.

Q How are you employed?

A I am manager to a pizza place in Coolridge.

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Q Are you related to Johnny Paul Penry?

A Yes, I am.

Q And, how are you related to him?

A Brother.

Q Okay. Are you older or younger?

A Younger.

Q About how many years younger are you?

A I don't know exactly.

Q Alright. A few years?

A Yeah.

Q Did you grow up with Johnny?

A Yes, I did.

Q Is Johnny mentally retarded?

A Yes, he is.

Q How do you know?

A Just by trying to teach him to read and write. I have always known more on reading and writing than he did.

Q Okay. Was Johnny treated the same by his mother as you and the other siblings?

A We were both treated badly. But, Johnny was the worse.

Q Okay. Is it to believe that Johnny was really your father's child?

A No.

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Q Sir, for the purposes of the printed record, does Johnny look strikingly different from the rest of his siblings?
A Yes, Sir, he does.
Q Over all, Jesse, speaking of Johnny, was he mean and violent?
A No, he was not.
Q Did Johnny have any tendencies to take the blame for things other than his?
A Yes, he did.
Q Jesse, some years back, isn't it a fact that you did get a conviction for burglary?
A Yes, Sir.
Q Is that in Granberry?
A Yes, it was.
Q Here in Texas?
A Yes.
Q Did you get a probation?
A Yes.
Q Did you successfully serve out your probation?
A Yes.

BY MR. WRIGHT:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Is that burglary of a building or burglary of a habitation?
A Burglary of a habitation.
Q And, how many years probation did you get?
A Five years.
Q When was that?
A About ten or twelve years ago.
Q You live down the probation, okay?
A Yes, Sir.
Q No problems?
A No.
Q Were you with your sister?
A Yes, I was.
Q When that was committed?
A Yes, Sir.
Q Okay. That is the same offense, or both together?
A Yes.
Q You got no other convictions, I take it?
A No.
Q Okay. And, certainly no violent crimes or whatever in your past?
A No.
Q How old were you when this Defendant went to the Mexia State School, if you recall? Or do you remember much about that?

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A I don't know when Johnny left and came back, I know when he was there, but, then, disappeared and I don't -- I don't really remember how it came in like that.

Q Do you remember when he came back , 'er he got out of Mexia State School?

A I remember, yes, in Goodrich.

Q Okay. And, he lived there with you and your father for awhile?

A Yes, all of the girls and us two boys lived in Goodrich.

Q And, were you also, living with one of your aunts?

A My aunt was living with us, well, --

Q The other way around?

A What I am saying, staying at one of my aunt's houses.

Q What aunt was that?

A Evelyn.

Q What is her last name?

A Young.

Q Was she the one that was living with you?

A No, she was living beside us. She had her house and, well, this was her house that we were staying in, too.

Q That was after he got out of Mexia?

A Yes.

Q Okay. And, how long did he live there with you and your father and sisters after he got out of Mexia?

A I don't know. I was being pulled between the two parents, so, --

Q You go to your mother's some?

A Right.

Q They were having a custody dispute between them over the divorce, is that fair to say?

A Yes.

Q Were you around when he went to Austin State Hospital on a commitment out of Harris County?

A I was gone. No, I don't remember that. I mean, I remember it, but, I don't. I wasn't around.

Q Okay. You do know that he did go to the Austin State Hospital?

A Yes.

Q Transferred there to Rusk?

A Yes.

Q Were you gone from home, the entire time he was in those two hospitals?

A Yes.

Q It was about a four or five month period, I

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guess, is all that it amounted to, but, you were not home at that time?

A Right.

Q Do you know why he went to the hospital?

A Just bits and pieces. I never did hear the whole story of it.

Q What are the bits and pieces that you remember?

BY MR. SMITH:

Objection, speaking hearsay.

BY MR. PRICE:

I didn't understand the objection.

BY MR. SMITH:

Hearsay.

BY THE COURT:

Sustain the objection.

Q Did you know that he had left home before he wound up in the Austin State Hospital?

A No.

Q You didn't know that he had lived in Lufkin, for a while, worked at a restaurant there in Lufkin?

A No, not at the time. I was in Ohio.

Q Okay. Is that where your mother was at that time?

A Yes.

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Q When did your mom pass away?

A Eleven or twelve years ago. I think it was in 1980, December, or right before Christmas.

Q How old were you -- well, you are six years younger than, or approximately six years younger than Mr. Penry is?

A I am twenty-eight, Yes, Sir.

Q Somewhere in that area. You don't, I guess you don't remember much about his early childhood then, do you?

A Well, I remember bits and pieces of, you know, the little things, that a kid will remember.

Q How old were you when you have your first recollection?

A I don't know how old I was,

Q Two or three years old?

A I don't know how old I was.

Q Okay. Do you remember him going over to Mexia State School?

A No, I don't. I remember going to visit him.

Q Okay. With your parents?

A Right.

Q That includes your mother?

A Yes.

Q Are you married?

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A Yes, I am.
Q Do you have children?
A I have a step-daughter.
Q Are you employed?
A Yes, Sir, I am.
Q Who are you employed by?
A Ricardo's Pizza.
Q In your recollection, your earliest recollection of this Defendant, do you recall him being violent?
A No, I don't.
Q Do you recall an instance where he took a sharp object and peeled the skin off the bottom of your feet?
A Yes, I do. If he ever went -- he did this, but it wasn't as if he ever made me cry or anything. He would always pat me and say he didn't mean to.
Q He did hurt you some?
A I can only remember one or two instances, yes.
Q You were a very young child at that time, weren't you?
A Yes, I was.
Q But, it sticks out in your mind, though?
A Yes.

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BY MR. PRICE:
I have no further questions.
BY THE COURT:
Any other questions?
BY MR. WRIGHT:
Nothing further, Your Honor.
BY THE COURT:
Okay. You can step-down. You are not to discuss your testimony with any other witness.
Who is your next witness?
BY MRS. LIEB:
Lucille Anderson.
BY THE COURT:
Lucille Anderson.
REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)
BY THE COURT:
Just have a seat and if you would, when you sit down would you move that mic around where you can speak into it so everyone on the jury can hear. Alright.

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LUCILLE ANDERSON

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Please state your name?

A Lucille Anderson.

Q And, what town do you live?

A Willis, Texas.

Q Are you related to Johnny?

A I am Johnny's aunt.

Q And, that is on his father's side, is that right?

A Yes.

Q Do you remember your brother's first wife, Shirley?

A Yes, I remember Shirley.

Q She is Johnny's mother, is that right?

A Right, uh-huh.

Q How old was she when she married your brother?

A About sixteen.

Q Can you describe her personality at that time?

A Well, at the time, she was very unhappy because her mother had passed away.

Q When was the first time you saw Johnny?

A The first time I saw Johnny was when he was brought to me from Laughton,Oklahoma, as an infant baby, three weeks old, his mother was in the hospital, had to be put in a mental hospital at the time.

Q And, you saw him when he was three weeks old?

A Yes.

Q And, who brought him to you?

A My brother and some of his friends from Laughton, brought the children to me because the mother had to be put in the hospital.

Q You were living in Texas at the time?

A Yes, in Houston.

Q Did you take care of the child?

A Yes, for eight months.

Q Okay. Can you describe him physically as a child?

A Beautiful. They brought him to me in a bassinet beautiful little baby boy.

Q Did there come a time when your brother and Shirley returned from Oklahoma?

A Yes. After they released her from the hospital, mental hospital in Laughton, they came to home to take the responsibility of their little children.

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Q And, you were taking care of another child, also?
A Trudy and Johnny.
Q And, did they live with you?
A Yes, for about two months, until they could get on their own.
Q When Shirley returned, did she take-over the responsibility for Johnny?
A She tried, but, it was very hard because the children were looking to me, I was like mama, and it was hard for her, but, she tried.
Q Did you see Shirley show Johnny affection?
A At times she was affectionate, not any long period of time, she would kiss them and love them.
Q Did you ever hear Shirley call Johnny any names?
A Yes.
Q What would she call him?
A The Little Nut, the Little Spoil Brat, the Little Bastard.
Q Was there a meaning behind the name, Little Bastard?
A The only meaning that I could put behind that, is that she said, that is my brother, she come home with us, pregnancy, two months pregnant

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with Little Johnny, and she knew I knew it.
Q You knew that?
A So that would be behind the words, I suppose, that she would use, and there was jealousy because there was affection toward - like mama, and I could see, you know, why she would feel that way, because it was very hard to turn to the real mama.
Q Did you ever see Shirley slap Johnny when he was a little baby?
A Yes. Not just a slap, she would sock him when he would be sitting in the high chair eating, right in the mouth.
Q See that on more than one occasion?
A I just saw it that one time, and I don't know how many more times it could have happened.
Q How old was he when she socked him in the mouth?
A She had been in our place about two months, after they came home from Laughton, and it was sometimes between those two months that they had to stay with us, until they could get on their own.
Q So, you saw Shirley sock him when he was about ten months old?
A Just a little baby in a high chair.

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Q You were eating at the time?
A Yes.
Q What happened to the food in his mouth?
A If you have a mouth full in your mouth, you are going to spit it out if you are sl: ed in the mouth.
Q You know what triggered the slap?
A She didn't like the way he was chewing it, or eating. I guess it was kind of, you know, little babies, takes time to learn.
Q Did you see a disciplinary slap, or something worse?
A I can only talk about what I saw.
Q Right. But, was that a normal disciplinary type thing?
A Not towards a little baby, no.
Q It was rougher than that?
A Yes.
Q Did you say something to Shirley when you saw that?
A Well, since we already knew, that I knew that Little Johnny -- she was pregnant with him when she came home and my brother forgave her and took him in, gave him his name and to be his father, he tried to be a good father, but,

she knew I knew that he was not my brother's son.
Q Okay. Did you say something to her?
A I told her, I said, that he couldn't pay for what she done wrong, that was her doing, ot him, and he wasn't to blame.
Q Meaning that Johnny wasn't to blame?
A Little Johnny was not to blame for the way that he was brought into this wicked system.
Q What did Shirley say to you?
A She didn't say anything, she just looked at me.
Q And, you said that the family moved out when Johnny was about ten months old or so?
A Something like that.
Q Sometime thereafter, did you see Johnny with a broken arm?
A Well, sometime within that first year, I saw his arm in a cast. I did not see the accident, I asked about it, the answer that I got, was that --

BY MR. PRICE:

Objection, Your Honor, to hearsay.

BY THE COURT:

Okay. Don't tell us what someone else told you.

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Q But, you didn't see what happened?
A No, I didn't see it.
Q But, you saw his arm?
A I saw his arm in a cast, right.
Q Was there a time later on when Shirley left one or more of her children with you again?
A Well, she left my brother again some time later, this was after they were situated in their own little home, she left again and was gone for quite some time, I do not remember how long, and she took only Trudy with her and not Johnny, and left Johnny and then, later Trudy was dropped off at my house with impetigo and I, as soon as I got her well, over the impetigo, she came back to get Trudy.
Q Did she want to get Johnny also?
A No, she didn't mention Johnny.
Q Was there a time ever that Shirley physically attacked you?
A Yeah, this one time when she came back just to get Trudy, after I had gotten her well over the impetigo, yes, she attacked me and was accusing me of stealing her children's affection. I knew that she was not well, I knew that she was mentally ill, by the way she acted, but,

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I did have to ward off some blows.
Q She actually, --
A She actually attacked me.
Q Did the police come?
A My son had called the police because he was afraid for his mother, naturally, yes. The police came and they had her to leave because she was disturbing the peace, and a man was parked down the road a little ways in a truck, waiting for her and she left with him.
Q And, after Johnny was no more than a little baby, you physically lost touch with him, didn't see him too much?
A I would see him occasionally at family reunions.

BY MRS. HILL:

I pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Anderson, I believe back when Johnny was seventeen years old, did he run away from home?
A I heard that he had, but, I don't know that he had.
Q You don't? You do know that he got arrested in Houston, don't you?

BY MR. SMITH:

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APPENDIX G

EXCERPT FROM CROSS-EXAMINATION

OF DR. PRICE

objection, and Ninety-Seven is admitted -- it was admitted yesterday, and it is admitted again, we the right that you will have the right to look at it over your objection.

BY MR. SMITH:

Alright.

(END OF CONVERSATION HELD AT THE BENCH.)

A And, it was actually from Dr. Pebbles, also, MHMR.

Q I think they are in. Can I see your MHMR records?

A (Witness Handing).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS ONE HUNDRED ONE AND ONE HUNDRED ONE (A) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Dr. Price, I am going to show you first of all what has been marked as State's Exhibit Number 101 (A), and ask you are those the documents from MHMR that you relied upon?

A Yes, they are.

Q Now, I want to show you State's Exhibit Number 101, and I am going to direct your attention to a couple of documents in there that I marked already about half way through, The first

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document there, does that appear to be the same document that is a letter from Dr. Pebbles, that is part of State's Exhibit Number 101 (A)?

A Yes, it appears to be.

Q And, if you would, the next documer does that appear to be the same document in 101 (A) which is a document signed by Mary Cochran, psychologist?

A Yes, it is.

BY MR. PRICE:

Your Honor, we would offer into evidence, State's Exhibits 101, the Defendant's records from Texas Department of Mental Health and Retardation in Polk County, and State's Exhibit Number 101 (A) which is the document which the witness relied upon.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. PRICE:

Judge, for the purposes of the record, for all of these exhibits, on the Punishment Phase Exhibits, we would agree for Counsel to make objections out of the presence of the jury.

BY MR. SMITH:

As to 101 (A), Judge, we object on the grounds of insufficient, we usually go earlier, and also, the Fifth Amendment etc.

BY THE COURT:

State's Exhibit 101 (A) is admitted over the Defendant's objection, and 101 is admitted over the objection, subject to making further inspection of it.

BY MR. PRICE:

Yes, Sir. For the purposes of the record, I might add that State's Exhibit 101 has previously been introduced in these proceedings under Defendant's Exhibit Number Four.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Do you have any Texas Rehabilitation?

A Yeah. (Handing).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS 102 and 102 (A) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Dr. Price, I will show you what has been marked as State's Exhibit 102 (A) and ask you if that

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APPENDIX H

EXCERPT FROM THE REDIRECT EXAMINATION

OF DR. PRICE

would love for him to take them back to Dallas.

BY THE COURT:

He has enough records, let's proceed.

Q Now, in 1965, try to do this so everyone can see, try to write legibly, which I very rarely do.

In 1965, there was a verbal and a performance and an overall score, right?

A Yes, that's correct.

Q Okay. I am going to write up here, "V" for verbal, and "P" for performance, okay? Can you read my writing?

A Yes, Sir.

Q Does my "P" show signs of brain damage?

A It might.

Q Thank you.

BY MR. PRICE:

At least impairment.

Q What was his verbal score in 1965?

A 72.

Q Okay. And, what was his performance score in 1965?

A 47.

Q And, what was the full scale score in 1965?

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A 56.
Q And, that is consistent or inconsistent with your conclusion that Johnny Perry is mentally retarded?
A Consistent.
Q Okay. What is the next IQ score that you are aware of?
A 1968.
Q 1968? We have got a twelve year old now, correct?
A Yes, that's correct.
Q And, we have a verbal there?
A Yes, 55.
Q 55. What is the performance score?
A It is also 55.
Q And, what is the full scale?
A It is 51.
Q And, someday, not now, because it would take too long, to explain to me how a professional averages 55 and 55 and gets 51?
A It is not an average, it is a different set of forms for the full scale IQ.
Q Okay. But, that happens?
A I have seen that happen before.
Q Does that happen sometime? And, what is that consistent or inconsistent?
A That is consistent.

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Q With your view that he is mentally retarded?
A It is consistent.
Q Okay. What is the next time, asfaras you know, that anyone ever gave him an IQ test or give him any kind of a IQ score?
A 1973.
Q Well, before you get to '73, let me show you Defendant's Exhibit Seven already in evidence, a copy which is dated June 10, 1971. Have you seen that before?
A Yes, I have.
Q And, what is that?
A This is an educational prescription that I believe was from the school.
Q Does that say anything about his IQ in 1971?
A Yes, it says that the results were generally in line with his measured IQ of 51, which they actually obtained from doing a chronological age, comparing his mental age, and as a result with have a general IQ score there of 51.
Q So, they did some kind of a process that they said was consistent with the 51 IQ?
A That's correct, yes.
Q They didn't do a separate IQ test, but, they took a look and looked back and said it looks

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consistent with the 51 score in 1968?
A Yes, that's correct.
Q Okay. Tell me again where the cut-off for mental retardation according to the standard case?
A It is 70, is the cut-off.
Q Now, will you tell me about this 1973? In 1973, there are a few different documents there.
A Yes, these were -- it was the first set that came from the school system, the Goose Creek Independent School District.
Q Okay. Documents there dated January 23, '73?
A January 23, of '73, overall IQ was less than 50.
Q Okay. Gave him some kind of a test in Goose Creek, then, in January of '73, came out less than 50, right?
BY MR. PRICE:
Could I see that document, please?
BY MR. SMITH:
That is Defendant's Exhibit Number Three in evidence.
BY MR, PRICE:
Could I see it?
Q If it had showed something less than 50, --

A Less than 50.
Q Get the idea?
A Yes, Sir.
Q And, then, you have an IQ of some kind of IQ test in September of '73?
A Yes, Sir, the Austin State Hospital.
Q At Austin?
A Yeah. They did a short form of the IQ test and said that the IQ was approximately 50.
Q Okay. About 50. And, then, in October of '73, did they do another one?
A Yes, that was at Rusk State Hospital.
Q Okay. That they gave a verbal and performance in a full scale, right?
A Yes, that's correct.
Q What was the verbal?
A The verbal was 50 -- 69.
Q 69. What was the performance?
A 74.
Q And, what was the full scale?
A 69.
Q And, was that consistent or inconsistent with mental retardation?
A That is consistent.
Q Okay. Now, in November of 1976, did somebody

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test him again?

A Yes, that was MHMR in Deep East Texas.

Q And, what score did they get there?

A They gave a Stanford-Binet, which is the other major IQ test, and came out with an Q of 43.

Q They said that was 43, and they said that was low?

A They said that they felt that was another estimate of intellectual ability..

BY MR. PRICE:

Where is that document? Where did you get that document from?

A Also, that one goes back to -- I don't know the Exhibit Number, on the MHMR.

BY MR. SMITH:

You may put it in, probably. Alright, under estimate next to the 43.

BY MR. PRICE:

Specifically it says, "This appears to be an under estimation of his ability."

BY THE WITNESS:

Mr. Smith, let me write under estimation or under estimate.

BY MR. PRICE:

Doesn't matter.

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Q Okay. Okay. And, is that consistent or inconsistent with mental retardation?

A It is consistent with mental retardation.

Q Even if 43, is an under estimate he is still retarded, is that correct?

A Yes, that would be correct.

Q Then, was he given a test in 1978? I forgot to write down 1976, year here.

1978, did they give him a test?

A The next one I have is 1979, I think from the TRC, that is what I have on here.

Q What is the exact date?

A 9/18/79.

Q Okay. That is a typo here in 1979. What was the verbal score in 1979?

A 56.

Q 56. What was the performance score?

A 72.

Q 72. What was the full scale?

A 61.

Q Okay. And, you did a test in 1990, right?

A Yes, that's correct.

Q What were your results?

A The verbal is 63.

Q Okay.

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A Performance 66, full scale is 63.

Q This man ever in his life, asfaras you know, have an IQ test that didn't show him to be retarded?

A No.

Q Okay. Dr. Price, one more time. W. t was the purpose for which you examined Johnny Paul Penry?

A To determine if there was a presence of mental retardation and/or organic brain damage, and if so, to what extent.

Q And, tell us one more time, what you found?

A Found that he has organic brain damage, and as a result, brain impairment, which because it started so early in childhood, this diagnosis of retardation.

Q And, Mr. Price, showed you a lot of documents that he asked you whether you had seen and you said you hadn't, seen them. Now that he has shown them to you, is there anything from the test, any doubt whatsoever on your conclusion?

A No, there is not.

BY MR. SMITH:

Pass the witness.

RECROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q When did you look at the documents?

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APPENDIX I

EXCERPT FROM THE DIRECT EXAMINATION OF

DR. SAMENOW

Q Whether you want to use those adaptive skills for good or evil?
A There is a choice.
Q Did you notice various diagnoses of this Defendant throughout his mental he :h history?
A Many.
Q Okay. Does that strike you as kind of unusual Doctor?
A No, not really, because he was a very, very puzzling person to the people that confronted him over the years, and so, really, the diagnoses ran --. I won't say that everything that he was termed, that you could term somebody, but, boy there was a long list. Brain damage, psychosis, adjustment reaction, of course, the mental retardation, anti-social personality, and there are many -- of such an individual, and people saw different -- at different times, and they were certainly puzzled by what they saw, and I think that has an awful lot to do with the variance of diagnoses.
Q Why do you feel like that there was such a variance there?
A Because I think this man has been involved in many, many different ways, depending upon what

his objective is. There were numerous citations in the record, both I believe in the medical records and the disciplinary records, that if he was angry and if he wanted to lessen the severity of punishment for an infra ion, he might threaten to kill himself, so, therefore, he would appear to be verbal. There were times when he appeared to be very non-verbal and not to understand very much. So, this was attributed to retardation.

The adjustment reaction, well, there were times when he was able to behave pretty well, he would get paroled to the rape conviction, the records reflect that he did well then, so, perhaps it was adjustment reaction. So, again, people saw slices of behavior and based on what they saw, they might make a diagnosis, and others say the psychiatrist, indicate that there are some observations that he heard voices, and they were auditory, and I believe, visual hallucinations Well, there was one doctor that had, I think it was Dr. Pebbles, I have to check my notes, who conjectured that he may well have picked this up at Austin, at the state hospital, and so, there was some question about malingering in terms of

psychosis, in other words.

BY MR. SMITH:

Renew, for the record, Estelle v. Smith objection and move to strike the testimony from the record.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

And, a Motion for Mistrial.

BY THE COURT:

Motion for Mistrial is denied.

Q Go ahead, Doctor.

A It was Dr. Pebbles, who stated, and this was on the 19th of May, 1979, he, in reference to Mr. Penry, relates that he has on occasion, heard voices and saw things, but, he is very vague, and I, Dr. Pebbles, talking people, that he probably learned this at Rusk State Hospital and is using this as an excuse to cover up his offenses.

Q I think that maybe at the date that you said, May of 1979, I believe it should be May of '77, Doctor.

A I may have typed the wrong date in my notes here, I don't know.

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Q When he was examined by the Polk County MHMR?

A Yes, it is in the Polk County Folder.

Q Okay. Was that on the first rape case with Diana Koch examination?

A Yes.

Q Okay. What again did Dr. Pebbles say there that he may have learned that?

A At Rusk State Hospital, as an excuse to cover up his offenses.

Q Did you see instances where he would use maybe mental retardation as an excuse?

A Yes. There was several observations made by his using, or at least a conjecture that he was using the mental retardation and again, the TDC Medical Records, Volume One.

BY MR. SMITH:

Same objection, same motion, Your Honor.

BY THE COURT:

Objection is overruled.

A This was, if my memory serves me correctly, it had to do with a breaking of a sink in his cell, and Mr. Penry felt he should not have to pay because he is retarded, and in a discussion at that time, he brought up, this is a quote, "If

SF-AZ-13 PENGAD/INDY, MUNCIE, IN 47308

I was working, they may think I am not retarded, anymore."

In other words, he thought that the fact that he was working in a work capable program, might suggest that perhaps he wasn retarded.

Q And, just generally speaking, were there examples of where he would use his mental retardation as an excuse?

A Yes.

Q Okay. Was he, or has he been diagnosed as having anti-social personality on several occasions?

A Yes.

Q Do you concur with that diagnosis, Doctor?

A Yes.

Q Would you kind of tell the jury about what an anti-social personality is?

A Well, the term anti-social personality cannot be applied to an individual unless he is eighteen or over, but, the onset occurs before the age of fifteen, and there is a list, I have the DSM3.

Q You don't have to go through it, unless you want to.

A Alright. Let me just say this. In my review of the records, there was a series of expanding and intensifying anti-social acts, virtually in

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every category; sexual misconduct, fire, fight, theft, runaways, and this again, very,very clearly in life, I think there was something in the records about a three-year old brother, but in any event, everyone has problems wi this human, whether at home, or the attempt at school in these institutions in which he was in, because he would not live within the norms and standards or guidelines of those institutions, except again, like I said earlier, when it served his purpose, and as it obviously did in terms of earning a parole.

Q Did you note from his records a broad range of criminal behavior as you just mentioned?

A Yes. In virtually every area, sex, property, assaultive, references to substance abuse, although, there was not a major pattern, but, it was there, and a lot of violence.

Q What significants do you attach to the fact of that broad range of criminal activity?

A Well, that this -- that Mr. Penry was a person who really,simply made a series of choices over time not to live within the, as I said earlier, the norm and standards of society, that he had a mind of his own, that he wanted to establish

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himself in this world, in his way, to exert power over people, or control people that he could control, that he was able to shut off concerns of right and wrong, long enough to do what he wanted to do, and did so with very, very little remorse, if at all, and that is a person who, in a sense, was the law within himself.

Q Is that consistent with anti-social personality?

A Yes.

Q Okay. Is that type of conduct or behavior necessarily consistent with mental retardation?

A Is it consistent with mental retardation?

Q Right.

A I would say, if anything, it is probably pretty inconsistent.

Q Inconsistent, but, it would be consistent with an anti-social personality?

A Yes.

Q In reviewing those records and his prior criminal and violent behavior, did you note where that may have involved any premeditation or planning, outside of the incidents that you have already mentioned about the murder at hand as well as to the rape of Diana Koch?

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A Well, I think some of the things that I referred to earlier, the fact, that is, Mr. Penry was able to kind of capitalize on the appearance of being retarded, or he would threaten, there was a threat to act crazy. This was a person w. did what he wanted to when he wanted to do it.

Q And, did you see specifically in his records where he had threatened to act crazy or act mentally retarded?

A Yes. This is from the TDC Medical Records.

BY MR. SMITH:

Can we have a continuing objection to everything out of the TDC records, Your Honor?

BY THE COURT:

Alright. The objection is overruled. You can answer the question.

A On Page 296, there is a quote by the staff, "He stated that he might start acting crazy if he didn't get a cell change."

Q Okay. Based on your review of those records, in your opinion, can he exercise self-control when he wants to?

A He can and he did.

Q What about acting deliberately?

BP-AE-18 PENGAD/INDY, MUNCIE, IN 47308

A He did, and he can.
Q In your opinion, Doctor, based on those records and what you have seen of this man, would you describe him as an aggressive or a passive individual?
A Aggressive.
Q Would you describe him as violent?
A Very.
Q Is he capable of acting voluntarily?
A Yes, he is.
Q These choices to engage in criminal activity, the criminal activities that you have seen, is that based upon his free will or is he just impulsive and can't control himself?
A Well, really, no indication that he is not able to control himself, that is, this is inside, he was able to control himself and there were periods where he was relatively well-behaved.
Q Based on the records that you reviewed, would you say that he is a manipulative individual?
A Yes.
Q Have you seen any indication that he showed any remorse?
A No.
Q Is he a loud criminal?

A Yes.
Q Does he have a criminal personality, as you described previously, in your writings?
A In the extreme sense.
Q Is he dangerous in your opinion?
A Yes.
Q Is he likely to change?
A Well, you know, I think that is -- it is a fair question, and I have asked questions about a person changing, and the answer is this. Who knows. That would be -- have to use past records as the best indicator, and also, one other thing, you did ask me whether he had expressed remorse and I said know, and there was also, nothing that I read in this whole pile here, nothing that I recall, anyway, saying that he really felt that this way of life was no good and for any of us to change anything about ourself, I don't know if the way it looks with cigarette smoking, much less a whole way of life, you have to reach a rock bottom and you have to be fed up with yourself, not the situation and I would say the prognosis would be pretty bleak.
Q Has his criminal behavior declined or escalated

as he has gotten older over the years?

A It has expanded and intensified.

Q Has it become more violent?

A Yes.

Q And, has it continued to be violent and assaultive even with him confined in a maximum security?

A Very much so, even in prison.

Q Okay.

BY MR. PRICE:

I pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. SMITH:

Q Who is Gregory Mark Campbell, Doctor?

A I beg your pardon?

Q Who is Gregory Mark Campbell?

A I don't know.

Q Was he a patient of yours?

A Gregory Mark?

Q Campbell. Is he a patient of yours?

A I cannot reveal who my patients are.

Q Was he a drug dealer?

A I cannot make any comment.

Q Well, it is a matter of public record that you submitted a report for him, isn't it?

A I don't know if that is a matter of public record.

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APPENDIX J

EXCERPT FROM THE STATE'S

CLOSING ARGUMENT

in that area, Diana Rearden could go out here and commit anything that she wanted to now, you know, I have been raped, so I can go do what I want to do. Nobody, no evidence, none of all that there is a causal connection.

I mentioned to you, this is society's part of the trial. I am going to get down to the heart, and then, sit down and shut up.

This has been a long, long ordeal for a lot of people. Long ordeal. I told you in opening argument this began on October 25th, to bring this man to justice. Pamela Carpenter started this battle to bring in to justice when she gave that description and when she put those two puncture holes in his back. She started that battle to bring him before the bar of justice. It is here now, and it is fixing to be handed to you and you do carry a very, very high responsibility and a very serious obligation. You have an obligation to protect society from the likes of Johnny Paul Penry, and you have an obligation to be sure that the punishment fits the crime, and you know how horrible the crime is and if there is anybody in this room that believes in the death penalty, we know that it is Johnny Paul Penry, because he inflicted it, without giving Pam Carpenter the right to a judge, jury, a lawyer. She didn't get her rights read to her, she got a pair of orange handled scissors buried deep in her chest.

The best example that I can give you of responsibility, and I am going to set down, your responsibilites in this case, in the facts of the case, and one thing that just kind of is back in the background there, and I want to point this out to you because it comes right back to your responsibility, and your decision in this case. In 1977, this man raped Diana Rearden. A few months later he was examined by Dr. Felix Pebbles, who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but, Dr. Pebbles, went on

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and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons. That was written on May 19, 1977. Two years later, and in August of 1979, Johnny Paul Penry was released from custody on parole, less than sixty days later, he murdered and raped Pam Carpenter. You have a responsibility to see that, that never occurs again. The horror that is Johnny Paul Penry is, etched in fact, in the sole of Diana Kearden and it is etched in the blood of Pam Carpenter. It must end here and that is your duty and responsibility. Thank you very much.

BY THE COURT:

Ladies and gentlemen of the jury, again, you are reminded that you are not to consider the argument of either of the attorneys as any evidence. At this time, you will retire into the jury room and

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APPENDIX K

REPORT OF DR. PEEBLES

DEEP EAST TEXAS REGIONAL
MENTAL HEALTH MENTAL RETARDATION SERVICES
TRINITY COUNTY OUTPATIENT CLINIC

Psychiatric Evaluation

NAME: JOHNNY PAUL PENRY CASE: ~~1264~~ 7722

WORKER: FELIX PEEBLES, M.D. DATE: May 19, 1977

PRESENTING PROBLEM:

This client was referred to the Trinity County Outpatient Clinic for psychiatric evaluation by Polk County District Judge Ernest C. Coker.

PERSONAL HISTORY:

This client is a 21 year old white single male who was born May 5, 1956. He was born in Lawton, Oklahoma and has lives much of his life in Texas. There is no history of abnormality in his birth, however he does have a history of temper tantrums, bedwetting, and nightmares and does occasionally bite his nails. He indicates that the bedwetting is still a problem at times.

He was very slow to learn and had a later than average history of learning to walk and talk and do all of the other things that average children do. He was entered in the 1st grade in school and went most of that year but did not proceed in school. He had difficulty learning and understanding and could not compete with the other first graders. He has never learned to read and write.

He says he is in good physical health and he has had no major illnesses and no major surgery. He said he had some tests in Ben Taub Hospital in Houston but he does not know the date. He said he was in one accident about 6 months ago after he had stolen a car. There were no apparent ill effects. He is not under a physician's care at this time and is not taking any medication. He believes he remembers taking some Mellaril and Thorazine back through the years from time to time.

He has held a number of jobs mostly around restaurants such as busboy or dishwashing. He does relate that he worked at the Sirloin Stockade in Lufkin, Texas but he was fired because he took the ice cream machine apart to clean it and could not put it back together. He thinks it was about 10 weeks that he was on the job at that location.

The client's father is John Penry, age 42 and is described as being in good physical health. The client indicates that he does not have a good relationship with his father. He says he has a lot of childhood memories of his father always being too hard on him. He has expressed being afraid of his father. He says his father calls him retarded and that this makes him very mad because he is not retarded. He just has some difficulty in learning.

cover up his offenses. He said he meant no harm to the woman whom he raped that he had never had a woman before and he wanted to see what it would be like to have a woman. He admits that he has been having problems with the law and with other people for as long as he can remember.

MENTAL STATUS:

His speech is fairly spontaneous and is entirely coherent and relevant at the time of this interview. I see no evidence of any auditory or visual hallucinations or of any delusional thought content or psychotic thought process at the time of this interview. His psychomotor activity is slightly accelerated and his mood is quite anxious and his affect is appropriate for his mood.

He is oriented as to the month and date of it being May 19, but he is unsure of the year. He guesses all the way from 1971 to 1975. His memory is moderately impaired for both recent and remote past events. On retention and recall he can only repeat one number correctly in forward order and none in reverse order, whereas the average person can repeat 5 or 6 numbers correctly both in forward order and reverse order. He is unable to interpret proverbs at all and certainly is unable to do any abstract thinking. On his grasp of general information he reveals that he believes Nixon is President and has no idea who the Vice President of the United States or the Governor of Texas, or of any other important people are at this time. His judgement and insight are quite severely impaired.

DIAGNOSIS:

1. Mental Retardation- moderate.
2. Adjustment Reaction of Adult Life.

It is my professional opinion that Johnnie Paul Penry is presently competent to stand trial and assist his counsel in the preparation of his defense. However, he is moderately retarded and his judgement and insight are moderately to severely impaired. He also has some antisocial features which account for him not learning by his past mistakes and making some of the same mistakes over again. He has little regard for others or even himself. His primary interests being immediate gratification of his impulses even without regard to consequence to himself.

It is my further professional opinion that Johnnie Paul Penry is and was sane at the time of the commission of the offense. At that time, and certainly at this time, he shows no evidence of psychosis or a break with reality or of not being aware of what he was doing or what was going on around him. It is true that his judgement and insight are impaired but he is sane in the legal sense.

It is my further professional opinion that if Johnnie Paul Penry were released from custody that he would be dangerous to other persons. I base this judgement on the fact that he tells me he did have a weapon and did produce this weapon and did threaten the woman with a switch blade knife if she did resist him. He does not have adequately developed internal self controls and has a long history of conflicts with people and difficulty with his interpersonal relationships leading back to childhood

This client's mother is Shirley Penry and the client does not know her age. He says, "My mom takes care of me". He believes his parents are divorced and that there is some conflict between his parents and that there has been some conflict for as long as he can remember. He prefers his mother to his father.

This client is the 2nd of 4 siblings, he has an older sister 23 years of age and he does not get along with her because, "She tells on me". There is a younger sister age 18 and a younger brother who is 15. Prior to the time he got into his present trouble he was living with his step-brother who is 23 years of age.

He remembers fighting with his parents when he was growing up and running away from home quite a bit. He indicates that he was physically abused as a child which caused his rebellious reactions.

PRESENT ILLNESS:

This client is a 21 year old Mexican-American single male who has a history of having been admitted to Austin State Hospital and transfered to Rusk State Hospital because he was a legal resident of Polk County which was in Rusk State Hospital's catchment area. This was from the latter part of 1973 until the early part of 1974. He relates the story of seeing a woman in Livingston and he liked her looks very much and told her a story about his brother getting in a car wreck and wanting him to take her down the street to it and gained entrance into the car. He related that he had a switch blade knife and he produced it and ordered her to drive out of town and came to a road turning off of the highway where there was a gate. He said he ordered her to ram the car through the gate and break it down and she did not and he took the wheel of the car and broke through the gate and drove down into an area out of sight from the road and did have sexual intercourse with her.

They were driving back toward Livingston, Texas and something happened to the car and he and the female whom he had abducted and with whom he had had sexual intercourse got out and started walking. They met a pickup and he got out in the middle of the road and flagged the pickup down. He asked for a ride and at that time the woman told the man that she had been abducted and raped by this client, Johnnie Paul Penry, at which time the man produced a shotgun he had in the pickup and held it on Johnnie Paul Penry and turned him in in Livingston, Texas for this offense. Johnnie says he is charged with Kidnapping and Rape.

He believes this was in February but he does not know what date and says that he has not seen an attorney and does not know when disposition will be made of his case. He thinks he has been in the Polk County Jail for about three months.

He says that he has been arrested many times for problems relating to stealing, arson, and other crimes. He relates that he has on occasion heard voices and saw things, but he is very vague and I feel that he probably learned this in Rusk State Hospital and is using this as an excuse to

and conflicts with his parents. And by his own admission he has been arrested "many times" for problems relating to stealing, arson, and other crimes. A person of this sort who is moderately mentally retarded does not comprehend properly what is going on around him and frequently responds inappropriately. Another thing that is disturbing is antisocial features which he has exhibited consisting of the apparent inability to love or be loved, to make lasting friends, to develop adequate interpersonal relationships, lack of regret for past offenses. He also has not learned from his mistakes and is likely to continue making some of his same mistakes over again.

Felix Peebles, M.D.
Psychiatrist

FP/mw

APPENDIX L

STATE STATUTORY PROVISIONS INVOLVED

Current Texas Code of Criminal Procedure Article 37.071

Relevant Portion Emphasized

Art. 37.071. Procedure in capital case

Sec. 1. If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment.

Sec. 2. (a) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7 01 and 7 02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article

(d) The court shall charge the jury that

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty,

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree, and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(2) The court, on the written request of the attorney representing the defendant, shall

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, and

(B) charge the jury in writing as follows

"Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted."

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury

(1) shall answer the issue "yes" or "no",

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree,

(3) need not agree on what particular evidence supports an affirmative finding on the issue, and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e) of this article, the court shall sentence the defendant to death If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals

(i) This article applies to the sentencing procedure in a capital case for an offense that is committed on or after September 1, 1991 For the purposes of this section, an offense is committed on or after September 1, 1991, if any element of that offense occurs on or after that date

Former Texas Code of Criminal Procedure Article 37.071

Art 37 071 Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment The proceeding shall be conducted in the trial court before the trial jury as soon as practicable In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas The state and the defendant or his counsel shall be permitted to present argument tor or against sentence of death

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result,

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted

(d) The court shall charge the jury that

(1) it may not answer any issue "yes" unless it agrees unanimously, and

(1) it may not answer any issue "yes" unless it agrees unanimously, and

(2) it may not answer any issue "no" unless 10 or more jurors agree

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals

Art 35 22 Oath to jury

When the jury has been selected, the following oath shall be administered them by the court or under its direction "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God"